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No. 02- OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

KATHLEEN DENSBERGER, Individually and as Executrix of the Estate of Colonel William Densberger, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), this Court established the criteria for extending to government contractors the immunity afforded to discretionary governmental functions under the Federal Tort Claims Act. The Court ruled that a government contractor cannot be held liable under state law for design defects when the following three elements are established: (i) federal officials approved reasonably precise specifications; (ii) the equipment conformed to those specifications; and (iii) the contractor warned the government about dangers in using the equipment actually "known" to the contractor but not to the government.

The court below nevertheless ruled that a government contractor may be held liable under state tort law for failing to warn the government of potential dangers about which the contractor "should have known" and that the government contractor defense does not apply unless the contractor proves that the government specifically "prescribed" defective warnings or expressly "proscribed" giving other warnings. The circuits are split three-to-three on the latter issue.

The following questions are presented:

1. Whether the "government contractor defense" recognized by this Court in *Boyle* v. *United Technologies Corp.* is available against a failure-to-warn claim only if the contractor can demonstrate that the government specifically "prescribed" defective warnings or expressly "proscribed" giving it additional warnings allegedly required under state tort law.

2. Whether state tort law may impose liability on suppliers of military equipment for failing to warn the government about potential dangers the contractors "should have" discovered, even though the government controls and limits the scope of product testing and the Court's decision in *Boyle* requires the contractors to warn only of hazards actually known.

RULES 29.6 AND 14.1 STATEMENT

In addition to the parties identified in the caption, the following persons were plaintiffs-appellees in the court of appeals and are respondents in this action: Mary Ann Kelly, Individually and as Executrix of the Estate of Colonel Robert Kelly; Lisa Rhodes Truluck, Individually and as Executrix of the Estate of Specialist Gary Rhodes, Jr.; Deborah L. Robertson, Individually and as Executrix of the Estate of Major General Jarrett Robertson; Christopher Mancini, CW2; Wendy Mancini; and Eric Johnson, Major.

Pursuant to Supreme Court Rule 29.6, counsel for petitioner United Technologies Corporation (UTC) certifies that UTC has no parent corporation and that no publicly held corporation owns 10 percent or more of UTC's stock.

UTC is the parent corporation of Sikorsky Aircraft Corporation and owns 100% of Sikorsky Aircraft Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

United Technologies Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 297 F.3d 66. The initial opinion of the court of appeals is reported at 283 F.3d 110. The opinion of the district court (App., *infra*, 18a-51a) is reported at 125 F. Supp. 2d 585.

JURISDICTION

The amended judgment of the court of appeals was entered and a timely petition for rehearing denied on July 19, 2002. App., *infra*, 17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), the Court recognized that the federal government's role in military procurement may displace state tort law in certain circumstances. The Court there fashioned, as a matter of federal law, a "government contractor defense" for "design defect" cases arising out of accidents involving materiel procured by federal agencies. This petition presents important questions, on which the Circuits are deeply divided, regarding the application of this defense to "failure to warn" claims.

The case arises from the crash, in Germany, of an Army Blackhawk helicopter in which several crew and passengers were injured or killed. The aircraft was equipped with an External Stores Support System ("ESSS"), a removable system of horizontal supports affixed to the helicopter's sides, from which auxiliary external fuel tanks can be suspended. Both the helicopter and the ESSS kit were manufactured by Sikorsky

Aircraft Corporation, a subsidiary of defendant/petitioner United Technologies Corporation, pursuant to a contract with the Army. Investigators concluded that the crash was caused by diminished control during an attempted landing, due to extreme lateral center-of-gravity ("CG") imbalance caused by asymmetrical fuel transfer from the external tanks.

The plaintiffs sued under Connecticut law. The jury rejected eight of the nine theories of potential liability submitted to it, but found that Sikorsky negligently had failed to warn the government adequately of the risks associated with lateral CG imbalance. The jury also rejected Sikorsky's government contractor defense, applying the narrow definition of the defense adopted by the district court and approved by the court of appeals. It awarded $22.9 million in damages.

The Army had controlled all aspects of the design and testing of the Blackhawk/ESSS, as well as the contents of the warnings contained in the operator's manual provided to Army pilots. Not until after the accident giving rise to this litigation did the Army authorize the additional testing that plaintiffs claimed Sikorsky should have urged the Army to conduct in order to determine what risks might be posed by imbalance during the kind of flight operations encountered in this case. In instructing on state negligence law, the district court stated that liability could rest on failure to warn of risks that "should have" been foreseen. The court then instructed that the government contractor defense is not available for failure-to-warn claims unless the contractor establishes that it was affirmatively "prohibited" from giving the warnings to the government that the jury might find state tort law to have required.

The Second Circuit affirmed, holding that the district court's instruction on the government contractor defense had correctly stated the law in that circuit. This holding, which is in accord with the view of the Ninth and Eleventh Circuits, conflicts with decisions of the Fifth, Sixth, and Seventh

Circuits. It renders *Boyle* a practical nullity across a wide range of cases, because failure-to-warn claims are routine in accident cases and because the government rarely "prohibits" its contractors from providing it with additional warnings (even though it frequently limits warnings provided to end-users). The Second Circuit rule allows a jury to apply state tort law to require a manufacturer to warn of risks beyond those of which it had actual knowledge and to require it to demand more testing to identify and quantify *potential* risks, while denying the *Boyle* defense unless the government "prohibits" it from pressing for more testing and warnings. This rule undermines *Boyle*'s protection of the relationship between the government and its contractors and is bound to have a negative impact on the government contracting process for many years to come.

A. Factual Background

1. When it crashed, the helicopter was attempting to land at an airfield in Wiesbaden, Germany, with a 230-gallon fuel tank mounted on each wing. During the flight, "no flow" indicator lights on the fuel control panel showed that fuel was not being transferred from the right-hand external tanks to the internal fuel system. Accordingly, the right side of the craft was substantially heavier than the left, causing the helicopter to be operating in a state of such extreme lateral CG imbalance that it exceeded the prescribed "flight envelope" (*i.e.*, its safe operating boundaries) as calculated on the basis of government-approved testing. As it began its descent, the pilot steered the helicopter into a shallow right turn in order to land on the parking ramp. However, when the pilot attempted to move the helicopter back to the left, the craft did not respond. Instead, it continued to turn steeply to the right and crashed on its right side, causing the fuel in the right external tank to explode.

2. The UH-60A Blackhawk helicopter involved in this accident was a twin-engine, squad-carrying Army helicopter. The craft and accompanying ESSS kit were manufactured by

Sikorsky pursuant to a contract between Sikorsky and the Army. The Army had engineers and pilots stationed at Sikorsky during the development process and had expertise in all aspects of the design and testing program for the Blackhawk/ESSS. Through its Aviation Systems Command (AVSCOM) – the unit with the technical engineering expertise responsible for procurement of all Army aircraft – the Army decided what testing would be conducted on the ESSS prior to issuance of an airworthiness certification. AVSCOM had approximately 800 engineers specializing in the development, qualification, and production of helicopters. A482.[1] As Col. Matson, the manager of R&D in the "Blackhawk Program Office," testified, he could consult with "several hundred" engineers and/or pilots for "technical assistance on engineering issues." A507. Not only did the Army control the testing conducted by Sikorsky (A390, A482-83, A487, A512), it also conducted its own production testing using only military pilots (A464, 487, 485, 513),without any consultation with, let alone participation by, Sikorsky. A379, A426, A481-82, A506.

As specified by the Army, the ESSS kit was designed exclusively for two "missions": (i) launching Hellfire missiles; and (ii) self-deployment (*i.e.*, allowing the carriage of sufficient fuel for the Blackhawk to fly across the Atlantic Ocean). The accident flight involved neither of those missions.

Flight hazards are typically identified by testing under mission conditions. The Army authorized Sikorsky to conduct very limited testing of the ESSS. E93 (¶7.2), E586, E600. The technical director of AVSCOM, Charles Crawford, decided to limit the scope of testing for lateral CG imbalance to "jettison testing," *i.e.*, testing to evaluate the controllability of the aircraft under conditions of imbalance resulting when one

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[1] Record cites ("A ___" and "E___") are to the Joint Appendix and Exhibits filed in the court of appeals.

external fuel tank is dropped, while the other tank or tanks remain attached. A404, A458, A483-84, A488-90. This jettison testing dovetailed with the two stated missions of the Blackhawk/ESSS, neither of which would require *landing* the helicopter in a state of imbalance (the accident scenario in this case). In any emergency, the tanks could simply be dropped over the Atlantic. E36; A461, A488. Crawford had authority to order additional testing but chose not to do so because the Army decided that such testing was unnecessary. A488. Crawford and Matson testified that the Army operates within financial constraints; aircraft testing is very costly. A460.[2]

Sikorsky conducted flight tests in accordance with the government-specified test plan. Each test required specific AVSCOM approval and was witnessed by its flight test coordinator. A421, A483, A506. Sikorsky had no authority to conduct additional or different tests on its own initiative. A408, A494-95, A512. The Army's decision to limit the scope of Sikorsky's testing was an independent determination by AVSCOM, and was not in any way based upon information supplied by Sikorsky. A498.

No aircraft would be accepted by the Army until AVSCOM determined that it conformed to the requisite specifications for the Blackhawk (E494; A476, A508, A511) and for the ESSS. E1; A476, A487. The Army's "statement of airworthiness qualification" signified that the ESSS system met all of the

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[2] The Army had also previously decided that, since the fuel tanks to be used with the ESSS would be "jettisonable," they did not need to be crashworthy. E36; A461, A488. The Army further decided – against the specific recommendation of Army testers – not to add fuel gauges or dipsticks that would have allowed pilots to monitor the depletion of fuel from individual auxiliary tanks of the ESSS kit. The Army concluded that such information was not required for the self-deployment mission and thus perceived "no user requirement for it." E708; A508, A509, A511-12.

specifications for the missions that it was designed to perform. E556 (¶3); A407, A493. In short, AVSCOM determined that Sikorsky had satisfactorily fulfilled each of its testing obligations and had delivered a military product that conformed to the specifications the Army established. A489, A492. The jury's verdicts confirmed that, specifically, Sikorsky had properly calculated the flight envelope. See pp. 7-8, *infra*.

The Army also had complete control over the contents of the operator's manual and the warnings provided to its pilots. A418, A490-92, A502, A514, A526. This control was exemplified by its directive to Sikorsky to *remove* from the manual a provision that Sikorsky had drafted setting forth procedures to be followed in cases of suspected lateral CG imbalance. A471, A514-15.

3. The Army had substantial knowledge before the accident about potential dangers associated with lateral CG imbalance. They were described in numerous sources, including an Air Force report on the Nighthawk helicopter; some of the Army's Airworthiness Releases; and two internal Army documents, the "Tailby Memorandum" and the "Sandman Report," neither of which was shared with Sikorsky. See n.7, *infra*.

4. The Army eventually used ESSS-equipped Blackhawks for missions different from those originally intended and for which the helicopters had not been specifically tested: carrying passengers over land with fuel tanks affixed to the ESSS, thus requiring that the Blackhawk *land* with the tanks affixed. Plaintiffs contended, and the jury apparently agreed, that Sikorsky became aware of these practices after Sikorsky sold the accident helicopter and ESSS. It was that knowledge that allegedly triggered a duty to provide *post-sale* warnings beyond the adequate ones supplied at the time of sale. Plaintiffs argued that Sikorsky should have warned the Army – before the accident – about the need for further testing based on the new missions, or that it should have conducted the testing itself and

advised the Army of the results. It was only after the fatal crash at Wiesbaden, however, that the Army commissioned Sikorsky to conduct "full blown" testing of the Blackhawk/ESSS. A521, A459, A489, A513.

The new testing reconfirmed the original flight-envelope chart but used shading to caution about operations near the outer edges of the envelope. A403; A522. The Army decided not to include this revised chart in the manual given to its pilots. It did, however, reinsert the "stop fuel transfer/select alternate tank" instructions to reduce risks in the event of lateral CG imbalance – *i.e.*, the instructions that Sikorsky had recommended for inclusion in the manual before the accident, but that the Army had rejected. E302-306, 402; A522; A514-18.

B. Proceedings Below

1. The plaintiffs sued Sikorsky, invoking Connecticut law. With respect to each of plaintiffs' theories – strict liability, implied warranty of merchantability, and negligence – the jury was asked three questions: (1) whether Sikorsky had "failed to properly calculate the lateral center of gravity limits" for the Blackhawk; (2) whether "the 'product' was not sufficiently crashworthy"; and (3) whether Sikorsky had "failed to warn the Army" that the Blackhawk "could become uncontrollable during foreseeable flight conditions." A610-12. The jury found for Sikorsky on eight of the nine questions, rejecting the first and second theories entirely, finding that Sikorsky had not improperly calculated the lateral CG limits for the Blackhawk/ESSS and that the craft was sufficiently crashworthy. Further, with respect to duty to warn, it found that Sikorsky had satisfied the responsibility to give adequate warnings at the time the helicopter was delivered.

The jury found against Sikorsky only on a separately charged common-law theory that Sikorsky had breached a *post-*

sale duty to warn the Army that the Blackhawk "could become uncontrollable during foreseeable flight conditions" – such as the new mission to carry passengers over land with the ESSS in use. App. 20a. The jury awarded $22.9 million in compensatory damages.

2. In reaching this result, the jury rejected the government contractor defense. The trial judge had instructed the jury that it could find Sikorsky negligent under state tort law for failing to warn the government "in view of the facts" it knew *or "should have perceived and known."* App. 53a (emphasis added). The judge also instructed the jury that Sikorsky could not avail itself of the government contractor defense on plaintiffs' failure-to-warn claim unless it had provided

> those warnings required of a seller [under state law] that were not, by the control or direction of the Army, *prohibited.*

App. *infra,* 55a (emphasis added). There being no claim that the Army had "prohibited" Sikorsky from providing any warnings to it, this instruction effectively directed a verdict against Sikorsky on the government contractor defense.

In rejecting Sikorsky's post-verdict motions, the district court described its interpretation of the government contractor defense (App. *infra*, 34a; emphasis added):

> The jury could therefore have found that [Sikorsky] failed to [establish] * * * the government contractor defense because [Sikorsky] did not prove that the Army's contract or specifications *prohibited* safety warnings beyond those provided by [Sikorsky].

3. Sikorsky contended on appeal (in addition to various state law claims) that the district court had misconstrued the government contractor defense and that, under a correct view of the defense, Sikorsky was entitled to judgment as a matter of

law or at least a new trial. The Second Circuit nevertheless affirmed in an opinion that manifested its hostility to the government contractor defense. In its original opinion, the panel declared that the defense is *never available* in a failure-to-warn case in which the duty runs to the government. 283 F.3d at 120.

Sikorsky's petition for rehearing noted the consensus in other circuits that the defense is available in such cases. In response, the court of appeals reiterated its doubts about the availability of the defense with respect to warnings to be provided to the government, but Judge Calabresi amended his opinion so that it no longer rested on this sweeping proposition. Instead, the amended opinion concluded that the defense exists, if at all, only in severely limited form. Thus, the court held that the district court's charge was "essentially correct" in limiting the defense to instances in which the Army "prohibited" the contractor from giving the warning the jury found state law to require. App., *infra*, at 17a. Because there was no contention that the government had expressly "*prohibited*" Sikorsky from providing it the warnings in question, the court ruled that Sikorsky had no protection from negligence liability under state law. *Id.* at 15a-17a.

REASONS FOR GRANTING THE PETITION

In its seminal *Boyle* decision, this Court recognized a federal common law defense for government contractors, derived from the discretionary function exception to the Federal Tort Claims Act, that supersedes state tort law. The Court explained that there is a "uniquely federal" interest in confining potential "civil liabilities arising out of the performance of federal procurement contracts." 487 U.S. at 505-506. The Court recognized the practical consequences of exposing military contractors to wide-ranging theories of liability under the varying tort laws of the States (*id.* at 507):

> The imposition of liability on government contractors will directly affect the terms of government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be affected.

Boyle involved a claim of design defect, and the Court delineated a three-element test for the defense. The question soon arose whether and how the defense applies to failure-to-warn claims. The same practical concerns for the efficiency and effectiveness of the contracting process are at stake, whatever state-law tort theory a claimant invokes. Not surprisingly, therefore, the courts of appeals have uniformly concluded that the defense is available in the failure-to-warn context.

There is, however, a conflict about its elements. The rule enunciated by the Second Circuit in this case, which the Ninth and Eleventh Circuits have adopted, tears a large hole in the fabric of the government contractor defense that only this Court can repair. In those circuits, a military contractor cannot defend against a warning claim by showing that (1) the government exercised its discretion in reviewing, editing, and approving the warnings associated with a product, as well as in deciding what testing is to be done to identify potential hazards, (2) the contractor complied with all of the government's requirements, and (3) the contractor possessed no actual, material information not known to the government. Rather, under the rule adopted in those circuits, the contractor must also show that the government specifically *prohibited* it from giving the warning about a potential hazard that, in the eyes of a jury, the contractor *should have* recognized.

I. THE COURT SHOULD RESOLVE THE MATURE CONFLICT AMONG THE CIRCUITS OVER THE SCOPE OF THE GOVERNMENT CONTRACTOR DEFENSE IN FAILURE-TO-WARN CASES.

Boyle involved a claim of "design defect": the plaintiff contended that the escape hatch on a military helicopter was unreasonably dangerous because it opened outward. The government's specifications for the craft, however, included that design feature. 487 U.S. at 509. In fashioning a defense intended to protect the "uniquely federal" interest in the efficiency of the federal procurement process, this Court looked to the Federal Tort Claims Act to illustrate those situations in which there may be a "significant conflict" between state tort law and federal interests. Under the FTCA, the government is not liable in tort for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government * * *." 28 U.S.C. § 2680(a). The Court extended this protection to government contractors when three elements show that the government has exercised a "discretionary function" with respect to the matter causing injury to an end user (487 U.S. at 512):

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

This federal doctrine "displaces" inconsistent state law.

A. The Circuits Are Divided Over The Proper Application Of *Boyle* To Warning Claims.

Every circuit that has considered the issue has recognized

that the government contractor defense applies to failure-to-warn claims. "The defense applies to failure-to-warn cases because the 'significant conflict' identified by the Supreme Court in *Boyle* is equally present when a federal contract and state tort law differ as to the nature and content of required product warnings." *Oliver* v. *Oshkosh Truck Corp.*, 96 F.3d 992, 1003 (7th Cir. 1996). See also *Grispo* v. *Eagle-Picher Indus., Inc.*, 897 F.2d 626, 629 (2d Cir. 1990) (collecting cases). But there is a deep, outcome-determinative circuit split over the proper interpretation of *Boyle*'s first element: the necessary extent of governmental involvement in developing the warnings that accompany the product. This case is an excellent vehicle for resolving the conflict; it presents a clean "failure to warn" claim, which is the only basis for the judgment below.

The Second Circuit's approach eviscerates the defense in most accident cases involving government procurements. Failure-to-warn claims have become a routine feature of product liability cases, because they side-step many constraints of traditional tort doctrines. See, *e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 267 (1990). Rarely if ever would the government *prohibit* a contractor from giving it warnings about potential hazards the contractor "should have perceived." Thus, the Second Circuit's approach virtually eliminates the protection the *Boyle* defense was intended to provide. It intrudes on the relationship between the federal government and its suppliers and exposes them to the vagaries of state law and individual juries' assessments of the communication they should have had.

1. In the Second, Ninth and Eleventh Circuits, the Contractor Must Show that the Government "Prohibited" Giving the Warnings Allegedly Required Under State Negligence Law. In *Grispo*, *supra*, the Second Circuit

addressed the duty to warn Navy workers of the risks associated with the use of asbestos. The Navy had specified the use of asbestos-based cement and was aware of the risks involved, but did not require the provision of warnings to the workers. The court rejected the contractor's invocation of the standard three-element *Boyle* test, holding that the government contractor defense is available only if "the Government *controlled* or *limited* the ability of [the] contractor[] * * * to warn those who would come into contact with its product." 897 F.2d at 632 (emphasis added). In the instant case, the Second Circuit applied this principle (sometimes called the "prescribe/ proscribe rule") to warnings going to the government itself. Thus, in that circuit, the government contractor defense bars a warning claim only if the government specifically prescribed any defective warning and/or prohibited the contractor from giving other warnings allegedly required under state law.

Two other circuits have adopted the restrictive "prescribe/ proscribe" rule of *Grispo*. In *Dorse* v. *Eagle-Picher Indus., Inc.*, 898 F.2d 1487 (11th Cir. 1990), the Eleventh Circuit held that where the government specifications do not "contain any *prohibition* against health warnings on the product," the government contractor defense does not apply to a claim that the contractor should have provided such a warning. *Id.* at 1489-90 (emphasis added). Similarly, in *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 812 (9th Cir. 1992) (emphasis added), the court ruled that because "the Navy in no way *prohibited* [the defendants] from placing warnings" on their products, the government contractor defense was unavailable.

The Ninth Circuit has applied the prescribe/proscribe rule to cases, like this one, involving specially-designed military equipment and focusing on an alleged duty to provide post-sale warnings to the government. In *Snell* v. *Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th Cir. 1997), the plaintiff asserted a "common law duty on the part of Bell to inform the

government of defects of which it learned after delivery." *Id.* at 749. The Ninth Circuit held the government contractor defense unavailable unless the manufacturer could show that the government "approved reasonably precise specifications *constraining* [its] ability to comply with whatever duty to warn it may have had" under state law. *Ibid.* (emphasis added).

Here, the Second Circuit echoed the Ninth in sharply confining the availability of the government contractor defense in failure-to-warn cases. It held that the district court had been correct in instructing the jury that Sikorsky was not entitled to the defense unless it proved that the government *prohibited* it from giving additional warnings. That instruction effectively directed a verdict against Sikorsky on the government contractor defense, as there was no evidence (nor would there generally be any) that the government prohibited the contractor from warning it. The jury thus never had to consider whether Sikorsky satisfied the other elements of the *Boyle* test.

2. The Fifth, Sixth and Seventh Circuits Reject The Prescribe/Proscribe Rule. Three other circuits, by contrast, have explicitly rejected the prescribe/proscribe rule and its underlying rationale and have applied *Boyle* to warning claims in a straightforward manner. They have held that, where the government reviews and approves the warnings accompanying a product, it has sufficiently exercised its discretion on the subject of warnings and that the contractor is entitled to the protection of the government contractor defense (provided, of course, that the contractor does not conceal actual knowledge of a hazard unknown to the government). These courts have reasoned that holding a contractor liable for failing to give additional warnings unless *prohibited* by the government would interfere with the relationship between the government and the contractor and frustrate this important defense.

In *Tate* v. *Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995) (*Tate I*), the plaintiffs sued the manufacturer of an Army

helicopter, claiming a failure "to adequately warn the crew members of the dangers associated with use of" a particular cargo-carrying system. *Id.* at 1156. The Sixth Circuit ruled, however, that the defense is available where the government exercises a meaningful measure of discretion in connection with the *development* of warnings, even if the government does not *dictate* the specific warnings or expressly *preclude* other warnings (*id.* at 1157; emphasis added; citations omitted):

> [S]ome of the cases decided in other circuits applying the government contractor defense to failure to warn claims may require a higher level of government involvement than we think is required. Several of the cases decided in our sister circuits indicate that the contractor must show 'that the Government itself dictated the content of the warnings,' [*Grispo*], 897 F.2d at 630, or that the United States imposed a 'prohibition against health warnings,' *Dorse*, 898 F.2d at 1489. We reiterate that the FTCA's discretionary function exemption delineates the contours of the defense. *Government discretion is required, not dictation or prohibition of warnings.* Where a contractor proposes warnings that the government substantively approves, and satisfies the second and third conditions, the defense displaces state law – *even if the government did not 'prohibit' the contractor from proposing more alarming warnings.*

The court reasoned that, where the government "exercise[s] its discretion and approve[s] the warnings, if any," associated with a product, "it has an interest in insulating its contractors from state failure to warn tort liability," and the government contractor defense applies. *Ibid.*

On appeal after remand, the Sixth Circuit affirmed the dismissal of the warning claim. It found that the Army's involvement in the development of the operator's manual for

the helicopter was a sufficient exercise of discretion to trigger the government contractor defense. *Tate* v. *Boeing Helicopters*, 140 F.3d 654, 658-61 (6th Cir. 1998) (*Tate II*). The court reiterated its disagreement with the interpretation of *Boyle* adopted by the Second, Ninth and Eleventh Circuits. It explained that the government need not have focused on the particular danger at issue in approving the warnings. If the government considered the issue of warnings, and the contractor adhered to the warnings that were approved by the government, the defense applies.[3] The court concluded: "Where government knowledge and concern are exhibited through the review process, it may be fairly said that the government has decided which warnings should and should not be provided to end users." *Id.* at 658. A more stringent requirement "would significantly increase the government contractor's evidentiary burden and would go beyond the requirements of the *Boyle* test." *Ibid.*

In *Oliver* v. *Oshkosh Truck Corp.*, 96 F.3d 992, 1004 n.8 (7th Cir. 1996), the Seventh Circuit rejected prescribe/proscribe as the basis for applying *Boyle* to failure-to-warn claims:

> We cannot accept as consistent with *Boyle* the suggestion that there is any strict requirement that the government 'prohibit' warnings altogether or 'dictate' the contents of the warnings actually incorporated.

The court agreed with the Sixth Circuit that, "when state law

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[3] This analysis mirrors the cases construing the FTCA. They hold that the government is entitled to the discretionary function exception, even if its decision-making process did not expressly consider particular alternatives later raised by a plaintiff in litigation. See, *e.g.*, *Baldassaro* v. *United* States, 64 F.3d 206, 211-12 (5th Cir. 1995); *Mitchell* v. *United States*, 225 F.3d 361 (3d Cir. 2000), cert. denied, 532 U.S. 1007 (2001); *Mid-South Holding Co.* v. *United States*, 225 F.3d 1201 (11th Cir. 2000); *Shansky* v. *United States*, 164 F.3d 688, 692 (1st Cir. 1999).

would otherwise impose liability for a failure to warn, that law can be displaced when the contractor can show that * * * the government exercised its discretion and approved certain warnings," if the contractor provided the approved warnings and did not actually know of hazards not disclosed to and not known by the government.

The Fifth Circuit, too, has rejected the prescribe/proscribe rule. In *Kerstetter* v. *Pacific Scientific Co.*, 210 F.3d 431 (5th Cir.), cert. denied, 531 U.S. 919 (2000), a Navy pilot had been ejected from his plane during a training maneuver when his pilot restraint system released without command. *Id.* at 433-34. The Fifth Circuit upheld the district court's conclusion that the government's involvement in the development of the operating manual sufficed to satisfy the first *Boyle* element (*id.* at 438):

> The district court found that the first element was satisfied in that the Navy approved, changed and edited warnings in the * * * Flight Manual. Although the manual contained no express evaluation of a warning of the specific hazard of inadvertent seat release, the government contractor defense applies because the Navy exercised discretion in approving warnings in the flight manual. See *Tate II*, 140 F.3d at 660 * * *.

Thus, the circuit conflict is deep, acknowledged, and outcome-determinative. It is also reflected in disarray in other federal and state courts.[4] It needs to be resolved.

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[4] New York state courts are split on the applicability of the prescribe/proscribe rule. Compare *Ronsini* v. *Worthington Corp.*, 683 N.Y.S.2d 39, 40 (App. Div. 1998) (defense not available where there is no "[f]ederal prescription of label information or proscription of a warning"), with *Stajano* v. *United Technologies Corp.*, No. 003052/1980 (N.Y. Sup. Ct. Oct. 8, 2002) (op. 21-22) (following *Tate* and *Kerstetter* and dismissing failure-to-warn claim without need to show government prohibited allegedly required warnings).

B. The Second Circuit's Approach Improperly Restricts The Government Contractor Defense.

This case presents, in sharp relief, the contrast between the two approaches currently prevailing in the courts of appeals and in the lower federal and state courts. The version of the defense adopted by the Fifth, Sixth, and Seventh Circuits hews faithfully to the *Boyle* criteria. Under it, the government's involvement in the development and issuance of warnings is sufficient to trigger the defense, so long as the contractor provided the warnings approved by the government and did not conceal hazards known to it but not to the government.

By contrast, the prescribe/proscribe rule requires a showing of rigid governmental control over the warning process. In that sense, it is virtually identical to a proposed articulation of the

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The prescribe/proscribe rule has been adopted by several other courts. See, *e.g.*, *Megill* v. *Worthington Pump, Inc.*, No. Civ. A. 98-76-SLR, 1999 WL 191565, at *4 (D. Del. Mar. 26, 1999) (no evidence that "Navy prohibited defendant from, or otherwise directed defendant in, issuing warnings or researching and effecting product safety"); *Jackson* v. *Deft, Inc.*, 273 Cal. Rptr. 214, 222-23 (Cal. App. 1990) (issue of fact "whether the specifications dictated the content of the labels and did not permit inclusion of any additional information").

District courts elsewhere have followed *Tate* in rejecting the prescribe/proscribe approach. See, *e.g.*, *Quiles* v. *Sikorsky Aircraft*, 84 F. Supp. 2d 154, 171 n.5 (D. Mass. 1999) (*Tate* "embodies the requirement of government discretion that was central to the Supreme Court's holding in *Boyle*."); *Yeroshefsky* v. *Unisys Corp.*, 962 F. Supp. 710, 718 (D. Md. 1997) (Fourth Circuit would most likely adopt *Tate* rationale); *Andrew* v. *Unisys Corp.*, 936 F. Supp. 821, 831 (W.D. Okla. 1996); *Crespo* v. *Unisys Corp.*, No. 94-2339, 1996 WL 875565, at *15 (D.N.J. June 21, 1996); *Russek* v. *Unisys Corp.*, 921 F. Supp. 1277, 1294 (D.N.J. 1996); *Haltiwanger* v. *Unisys Corp.*, 949 F. Supp. 898, 906 (D.D.C. 1996).

government contractor defense that this Court rejected in *Boyle*. The Court there noted that in *Shaw* v. *Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), the court had ruled that the defense would preclude suit only if

> (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

Boyle, 487 U.S. at 513 (emphasis in original). The Second Circuit's rule mirrors *Shaw*'s view that the contractor should receive protection only insofar as it acts, in effect, as a government-controlled automaton. Both courts assume that the government's discretion protects the contractor only when the government addresses precisely the risk that later materializes to cause the plaintiff's injury. While recognizing that the *Shaw* "formulation may represent a perfectly reasonable tort rule," this Court rejected it as not "designed to protect the federal interest embodied in the 'discretionary function' exemption" to the FTCA, because it would unfairly place the contractor "at risk unless it identifies all design defects." *Ibid.*

The prescribe/proscribe rule undermines the discretionary function exception in much the same way. It does not recognize that the government can exercise discretion by deciding whether (i) to approve warnings developed by the contractor or (ii) to commission additional testing that could lead to different warnings (see *Boyle*, 487 U.S. at 513). It also "penalize[s], and thus deter[s], active contractor participation in the design process, placing the contractor at risk unless it identifies all" possible risks. *Ibid.*

The prescribe/proscribe rule is an untenable constraint on

the government contractor defense in any case involving specialized military equipment (such as the Blackhawk/ESSS), where the government controls the contents of the user's manual. As many courts have recognized, the government typically engages in careful review of both the initial content and later revisions of the operating manuals for aircraft used by military personnel.[5] Imposing liability for failing to warn about the possible need for *more* testing and warnings threatens substantial interference with military discretion.

Thus, Judge Calabresi made a crucial practical mistake in expressing continuing doubts (App., *infra*, 16a-17a) about whether there is a "federal interest" under *Boyle* in protecting a contractor from liability, when the end-user plaintiff's claims are based on communications between the contractor and *the government*. Where specialized military equipment is concerned, the government controls the testing to be performed, including the warnings that spring from that testing. It controls the contents of the operating manual, including the warnings it contains. The contractor is not free to perform unauthorized testing or to insert additional, unapproved warnings. Whether state law views a duty to warn as running to the government or to the end-user (who is invariably the plaintiff in a failure-to-warn case, as this case illustrates), the contractor's communication about additional testing or warnings is always with the government in the first instance. The government has the same "federal interest" in supervising and controlling that communication with its contractors, and in limiting their

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[5] See *Emory* v. *McDonnell Douglas Corp.*, 148 F.3d 347, 351 (4th Cir. 1998); *Tate II*, 140 F.3d at 658; *In re Aircraft Crash Litig. Frederick, Md.*, 752 F. Supp. 1326, 1366 (S.D. Ohio 1990), aff'd mem. sub nom. *Darling* v. *Boeing Co.*, 935 F.2d 269 (6th Cir. 1991); *Nicholson* v. *United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988); *Miller* v. *United Technologies Corp.*, 660 A.2d 810, 836 (Conn. 1995). See also AIA Ct. App. Am. Br. at 15.

exposure to suits by end-users, as it did in *Boyle* with respect to communications relating to product design.

C. The Difference Between The Two Approaches Is Outcome-Determinative.

This case is no different from *Tate*, *Oliver*, or *Kerstetter*. It is beyond dispute that those courts would have reversed the district court's judgment in this case, and it is equally clear that a future Second Circuit panel could not decline to apply the prescribe/proscribe rule, wherever the duty to warn runs. Because the government actively supervised the warnings to be included in the Blackhawk operations manuals, the central issue under the *Tate* rule would have been whether Sikorsky met the third prong of *Boyle* – *i.e.*, did Sikorsky have actual, superior knowledge about the dangers of lateral CG imbalance? That question should have been evaluated on its merits, free of the district court's erroneous instruction, approved below, that the government contractor defense is inapplicable unless the government "prohibited" the contractor from giving the warnings thought to be required under state law. Sikorsky offered ample evidence to sustain all three elements of the defense, correctly viewed.

1. Reasonably precise specifications about warnings. As explained above, the Army exercised complete control over the scope of testing for the Blackhawk/ESSS and the warnings that emerged from the authorized tests. The Army specified all tests that Sikorsky was to perform, each of which had to be approved by AVSCOM. Sikorsky was not at liberty to conduct additional tests on its own initiative. A408, A494-95, A512. In view of the ESSS's planned missions, AVSCOM made a calculated decision to have Sikorsky conduct only "jettison testing." A404, A483-84, A488-90. Only after the accident did it authorize testing appropriate to the changed mission.

The Army also controlled the contents of the operator's

manual. For example, the Army directed Sikorsky to remove from the manual a provision that Sikorsky had drafted that outlined a procedure for dealing with suspected lateral imbalance. A471; E302-306; A514-17. The government exercised its discretionary control over these manuals in light of its judgments about preferred tactics and expected missions. The military's involvement in drafting and editing the operator's manual is precisely the function that the Fifth Circuit in *Kerstetter* and the Sixth Circuit in *Tate II* found to reflect a sufficient exercise of discretion to trigger application of the government contractor defense.

2. Compliance with the government's directions. Plaintiffs did not contend that Sikorsky failed to comply with the Army's decisions concerning design *or* warnings. To the contrary, the undisputed evidence demonstrated (and the jury found) that Sikorsky satisfactorily fulfilled each of its testing obligations (A489, A492) and followed the Army's directives with respect to the operator's manual. A471, A514-15. The jury's verdicts for Sikorsky on the strict liability and implied warranty counts confirm unequivocally that, as of the time of sale and delivery, Sikorsky had fully complied with all of the Army's specifications concerning both design and warnings.

3. Communication to the government of dangers known to Sikorsky but not to the government. Plaintiffs never identified a single document or piece of information concerning lateral CG imbalance that was known to Sikorsky but not to the Army.[6] By contrast, there was extensive documentary evidence

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[6] In rejecting Sikorsky's argument for judgment based upon the Army's knowledge of the relevant dangers, the panel stated, without elaboration or explanation, that "a reasonable jury *could* have concluded (a) that [Sikorsky] *knew or should have known* that the helicopter could become uncontrollable in an asymmetric condition when equipped with the ESSS auxiliary tanks and (b) that the Army did not have similar knowledge." App. 9a (emphasis added).

that the Army possessed at least equal information from multiple sources (several of which were not even available to Sikorsky) suggesting that there might be dangers associated with landing a Blackhawk experiencing lateral CG imbalance.[7]

Neither the district court nor the court of appeals cited any record support for a possible inference that Sikorsky actually "knew" something the Army did not. Moreover, the jury was never asked to make any finding regarding comparative knowledge, because the district court omitted any reference to comparative knowledge from its negligence instruction. See App., *infra*, 52a-53a. Not surprisingly, therefore, neither court below relied on any "superior knowledge" in addressing the *Boyle* defense.

Finally, a finding that Sikorsky "*should* have known" more about the hazards than the Army did would not defeat the government contractor defense. As discussed in the text, the third *Boyle* element requires the contractor to show only that it informed the government of all dangers of which it alone was *actually* aware.

[7] This evidence included:

1. An October 1990 internal Army memorandum from Squadron Leader Andrew Tailby, who had experienced control problems while attempting to land a Blackhawk/ESSS, recommended further testing of the Blackhawk/ESSS that would "permit commentary on the effects of extreme lateral cg conditions on aircraft handling qualities and operating procedures." E549; A397. Tailby warned the Army that under circumstances identical to those that led to the accident in this case, "it is possible to encounter a situation where control of the aircraft could be lost." E550 (¶4); A398, A419.

2. A second internal Army document, the Sandman Report, issued in 1991, warned that extreme lateral CG imbalance induced by asymmetric fuel transfer could cause the aircraft to become uncontrollable (E132 (¶64)) and recommended that a warning be placed in the operator's manual. E144.

3. A 1985 Nighthawk report issued by the Air Force, of which the Army was aware (A406, A489), described the loss of control that

In short, based on the trial evidence, Sikorsky had a right to have the jury evaluate the government contractor defense pursuant to the rule expressed by the Sixth Circuit in *Tate* and endorsed by the Fifth and Seventh Circuits: "[w]here a contractor proposes warnings that the government substantively approves, and satisfies the second and third conditions, the defense displaces state law * * * ." *Tate I*, 55 F.3d at 1157.

II. THE COURT SHOULD DETERMINE WHETHER IT IS CONSISTENT WITH ITS DECISION IN *BOYLE* TO HOLD A CONTRACTOR LIABLE UNDER STATE TORT LAW FOR FAILING TO WARN THE GOVERNMENT ABOUT POTENTIAL HAZARDS THE CONTRACTOR "SHOULD HAVE" IDENTIFIED.

1. This case poses a closely related issue under *Boyle* about the extent to which state law theories of liability may be used to regulate communications between a federal contractor and the government. In *Grispo* the Second Circuit rejected the argument that the third prong of *Boyle,* which exposes a defense contractor to liability for concealing *actual* knowledge about hazards, "preempts state law duties to warn." 897 F.2d at 632. In this case, the court permitted liability to be based on the theory that, under Connecticut law, Sikorsky had a post-sale duty to warn about potential hazards it "should have perceived" and that it breached this duty when it learned that the Army was using the ESSS-equipped Blackhawks for missions different from those for which pre-sale testing had been done to prepare "flight envelope" calculations and possible warnings. The theory was that Sikorsky "should have" recognized that the new

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could arise under conditions of extreme lateral imbalance. E233.

4. Army Airworthiness Releases issued in March 1988, February 1989, and October 1990, specifically cautioned that it was safe to fly the Blackhawk in an imbalanced state "only if the aircraft is essentially loaded symmetrically prior to jettison." E 573; see A490.

mission posed a potential hazard and should have pressed the Army to authorize – and thus pay for – new tests to serve as the basis for revised operational warnings.

By allowing liability to be imposed on the contractor under state negligence law for failing to warn about potential hazards of which it *should have been* aware, the Second Circuit's rule conflicts with *Boyle* itself. The third prong of the *Boyle* test requires the contractor to warn the government about all dangers actually "known to the supplier" but not to the government. 487 U.S. at 512. In adopting this precise but limited duty, the Court specifically considered an "alternative formulation" of the defense that would have left contractors exposed to state tort liability for failure to warn of alternatives "reasonably known" to the contractor. 487 U.S. at 513. The Court, however, rejected that formulation as imposing too demanding a standard.

2. The scope of potential liability of federal contractors for failure to warn of unknown hazards presents an important practical issue under *Boyle*. The tort law principles of many states, including the Connecticut law applied here, require a manufacturer of ordinary consumer products to warn of risks of which it *should have known*, even if it had no actual knowledge of the hazard. Indeed, some jurisdictions allow a plaintiff to recover simply on a finding that the lack of a warning rendered the product "unreasonably dangerous," even if the risk in question was *unknown and unknowable* before the accident. Automatically importing these broad obligations into the relationship between the federal government and military contractors raises all the concerns that the Court evaluated in *Boyle* in deciding that the contractors' liability should be limited to situations in which they failed to disclose *actual* knowledge of a hazard not known to the government.

The Second Circuit rule subverts the underlying *Boyle* principle that the government contractor defense is an essential

ingredient in defining the proper relationship between the government and its contractors *as a matter of federal law* and in assuring that the government, not the contractor, is in charge of determining how the product is to be designed, tested and used. This principle places clear limits on the circumstances in which state law may impose civil liability on a federal contractor for failing to give "warnings" to the government about unknown hazard or about the desirability of *further* testing to identify potential hazards.

The "should have known" standard is bound to create a more adversarial, uncertain and costly contracting process for specially designed military products. It will increase demands that the government finance additional "what if" testing, thus enhancing procurement costs. In many instances contractors will prove reluctant to manufacture products that the government needs but that, without the protection of the government contractor defense, carry an unacceptably high risk of liability. In cases like the present one, where Sikorsky did not know about any risk of loss of control, the contractor will be compelled to demand additional testing about *potential* hazards.

The conflict created between the contractor and the government is especially intense when state law is read to impose a "post-sale" duty to warn the government of potential hazards arising from new missions for which the military decides to use its equipment. Here, for example, the jury was allowed to base liability on a belief that Sikorsky should have pressed for more extensive *post-sale* testing of the ESSS, even though Army procurement officials had exercised their discretion to limit the extent and cost of the pre-sale testing program. This exposure requires the contractor to serve as a monitor of military operations: it must hector the government to commission and finance new tests looking to quantify the degree of risk arising from new missions and to reexamine the

operational warnings that could be furnished to end-users. This recipe for intrusiveness and badgering mocks *Boyle*.

3. Under *Boyle*, therefore, there should be no state law liability when the government has actively exercised its discretion with respect to the nature of the operational warnings to be given to product users and about the scope of testing that should be performed as a basis for identifying potential risks, which in turn might be the subject of further warnings. The third element of the *Boyle* test is precisely tailored to address the contractor's obligation to ensure that the exercise of government discretion is adequately informed by any knowledge the contractor alone *actually* knows. Unless this element is to be modified in the fashion that *Boyle* itself rejected, no theory of state tort law should be permitted to subject the contractor to liability for failing to warn of hazards about which it "should have known" but did not.

4. Finally, the Second Circuit expressed skepticism whether *Boyle* "should apply to limit the warnings that a reasonable seller would provide to the government itself" as distinguished from the end user (App. 16a-17a). This suggestion that a state-law duty to warn running to the government may displace *Boyle* stands the law on its head. States have no responsibility for regulating the relationship between the federal government and its suppliers. Rather, that is properly the domain of federal law. See, *e.g.*, *United States* v. *Kimball Foods, Inc.*, 440 U.S. 715, 726 (1979). If a defense contractor owes a disclosure duty to an end-user, state law may examine the flow of information, but *Boyle* expressly limits the extent to which state law may impose liability on federal contractors for acts or omissions that allegedly cause injury to those end-users. State law also must yield when an end-user seeks to invoke a "duty to warn" that purportedly ran to the federal government itself. Here the flow of information to the Army pilots was subject to the pervasive supervision of the

Army, which controlled the content of the manuals issued to its pilots as well as the tests on which those manuals were based. Thus, *Boyle* "displaces" (487 U.S. at 512) any state-law theory of liability inconsistent with its principles, whether the state views the "duty to warn" as running to the government or to the end user.

By its terms, *Boyle* allows state law to subject a contractor to civil liability for an accident, if the contractor *actually* knew of a hazard of which the government was ignorant but failed to warn the government. Thus, where there is actual, superior knowledge, it will be difficult to defeat a claim that the contractor breached a duty to warn, whether the duty ran to the end user or the government. But *Boyle* leaves no room for state law to impose liability on the theory that the contractor had an even broader duty of disclosure to the government, a duty to warn of potential hazards about which the contractor "should have known or perceived" but did not. The Court should resolve this important issue about the proper scope of state law.

III. THE SECOND CIRCUIT'S EVISCERATION OF *BOYLE* IS OF GREAT PRACTICAL IMPORTANCE.

The Court granted review in *Boyle* because it was vital to the federal contracting process to determine whether and under what circumstances a government contractor defense would be available in "design defect" tort cases. The same considerations impel review here. Virtually all product liability cases now are packaged to join "failure to warn" claims with the kind of "design defect" claim addressed in *Boyle*. This case illustrates that pattern. Unless *Boyle* is to be stripped of practical consequence, the Court needs to resolve the acknowledged conflict about the way the defense operates in warnings cases.

The military and its contractors work together in designing and modifying military equipment and in drafting appropriate end-user warnings that are consistent with not only user safety

but optimal military effectiveness. Discretionary judgments regarding trade-offs between mission requirements and issues of cost and safety, including the amount of testing that can be funded, are discussed collaboratively. But the military retains ultimate power to determine how to manage the process, making highly discretionary judgments about allocating resources for testing versus other needs. Its officials must use judgment in determining when the quest for safety in an inherently dangerous profession should yield to other demands.

The government may – as it did here – limit the warnings to be provided to end-users, but it does not "prohibit" communication *to it* of whatever warnings a jury later might find should have been flagged. No contractor could satisfy the government "prohibition" requirement, especially if the jury is allowed to second-guess what the contractor "should have" known or recognized about potential hazards.

This result has serious practical consequences. The *Boyle* test gives the contractor the benefit of the protection enjoyed by the government in exercising its discretion. The premise is that a cooperative relationship between contractor and the government will permit the government to exercise its discretion about military procurements more effectively and efficiently. The Second Circuit's prescribe/proscribe rule, however, disrupts that relationship. It inserts a wedge between the contracting parties and throws their interests out of alignment. Contractors that do business with the military will have to assume that they may be held liable for the failure to give any warnings of possible hazards that a jury later finds under state law that they "should have known" about. This means the law of *any* state, because it is impossible to predict what forum a future plaintiff may be able to select for a lawsuit.

Prudent contractors, therefore, will have no choice but to insist on pressuring the military officers to commission more tests than the government believes to be necessary in the

context of mission needs. They will have to transmit all warnings they can conceive and to document each warning so that the trail of accountability is clear. This adversarial process will pressure the military to "paper" its response to the contractor's warnings. The attendant delays, increased costs, and procurement disruptions will be substantial. These are precisely the tensions and burdens that *Boyle* sought to avoid.

Finally, this Court's resolution of the conflict is especially important because these questions fundamentally affect the nationwide contracting activities of the federal government. The standards for determining the protection that government contractors should receive should not depend on the forum in which the claim is brought. It is foreseeable that the state and circuit that impose the most severe limits on the federal defense will be preferred. Accordingly, it is especially important that these issues promptly receive an authoritative resolution – something only this Court can supply.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2002

APPENDIX

APPENDIX A
COURT OF APPEALS OPINION

United States Court of Appeals,
Second Circuit.

Kathleen DENSBERGER, Individually and as Executrix of the Estate of Colonel William Densberger, Mary Ann Kelly, Individually and as Executrix of the Estate of Colonel Robert Kelly, Lisa Rhodes Truluck, Individually and as Executrix of the Estate of Specialist Gary Rhodes, Jr., Deborah L. Robertson, Individually and as Executrix of the Estate of Major General Jarrett Robertson, Christopher Mancini, CW2, Wendy Mancini and Eric Johnson, Major
Plaintiffs-Appellees,

v.

UNITED TECHNOLOGIES CORPORATION, Defendant-Appellant, Aeroquip Corporation, Alcoa Composites Inc. and Brunswick Corp., *Defendants*

No. 00-9512.

Argued: Dec. 21, 2001.
Decided: March 12, 2002.
Amended: July 19, 2002.

Appeal from the United States District Court for the District of Connecticut.

Andrew L. Frey, Mayer Brown & Platt (Catherine M. Sharkey, Mayer, Brown & Platt, and Mark A. Dombroff, Raymond L. Mariani, Dombroff & Gilmore, New York City, on the brief) for Defendant-Appellant.

Steven R. Pounian (Francis G. Fleming, Brian J.

Alexander, Jacqueline M. James, Raafat S. Toss, on the brief), Kreindler & Kreindler, New York City, for Plaintiffs-Appellees.

William F. Sheehan, Frederick C. Schafrick, Ross E. Davies, Shea & Gardner, Washington, D.C., for Amicus Curiae, The Aerospace Industries Association of America, Inc.

Before MESKILL, KEARSE, and CALABRESI, Circuit Judges.

AMENDED OPINION

CALABRESI, Circuit Judge.

Following a $22.9 million jury verdict, the district court entered judgment for the plaintiffs, and denied the defendant's post-trial motions for judgment as a matter of law and for a new trial. Defendant United Technology Corporation ("UTC") appeals. The principal questions presented on appeal are whether the Connecticut Products Liability Act ("CPLA") preempts plaintiffs' common law negligence theory of recovery, whether the Army's alleged knowledge of the relevant dangers defeats plaintiffs' allegations of failure to warn, and whether the government contractor defense applies to the situation in this case. We affirm the district court.

BACKGROUND

On February 23, 1993, a United States Army UH-60A Blackhawk helicopter returned to the Wiesbaden, Germany airfield following a flight. The helicopter was equipped with the External Stores Support System ("ESSS") kit, a removable

system of horizontal supports affixed to the side of the helicopter from which two 230 gallon auxiliary external fuel tanks were suspended.[1]

As the helicopter approached the airfield's helipad, it began a shallow right turn to line up with the pad on the parking ramp. When the pilot attempted to level the helicopter out of the turn there was "no response" from the flight controls. The aircraft continued to turn steeply to the right. It completed an approximate 360 degree turn and crashed on its right side causing the right external tank to explode. Four Army officers died and two others – the pilot and an enlisted Army member – were severely injured.

The Blackhawk helicopter and the ESSS kit involved in this accident were manufactured for the U.S. Army by UTC. The Army was heavily involved in the development and testing of the Blackhawk, including testing of the ESSS-equipped version of the aircraft.

Post-accident investigation indicated that the helicopter involved in the crash may have had an unacceptable "asymmetric right lateral Center of Gravity (CG)"[2] at the time of the crash. This suspected lateral CG imbalance is thought to have resulted at least in part from the presence of unequal fuel loads in the right and left ESSS tanks. At the time of the crash,

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[1] The ESSS-kit was originally designed to provide substantially more fuel capacity for self-deployment (i.e., allowing the carriage of sufficient fuel for the Blackhawk to fly across the Atlantic Ocean) and for launching "Hellfire" missiles.

[2] "Lateral CG" refers to the side-to-side balance of the helicopter. The "flight envelope," or safe operating boundaries, for the aircraft is depicted in a "lateral CG chart," which consists of a curve plotted along two axes-the gross weight of the aircraft in pounds (vertical) and the lateral CG in inches (horizontal).

one auxiliary tank was nearly empty and the other was almost full. After the crash, additional flight tests were conducted. As a result of these tests, UTC developed a new "lateral center of gravity [flight] envelope," and recommended some special piloting procedures that were to be used when a helicopter operated outside of this "envelope." UTC also added a number of specific warnings to the operator's manual in relation to this new CG envelope.

The plaintiffs in this action – the pilot and passenger who survived the crash and the widows of the four deceased Army officers – sued UTC under the Connecticut Products Liability Act, Conn. Gen. Stat. §§ 52-572m-q, and asserted three distinct theories of liability: strict liability, negligence, and breach of implied warranty of merchantability. At the conclusion of an eleven day trial, the jury, answering interrogatories on a special verdict form, found UTC liable in negligence for failing to warn the Army that the helicopter could become uncontrollable during foreseeable flight conditions. The jury rejected all other grounds of liability, including those based on failure to warn under the strict liability and implied warranty theories. The jury also found that UTC had not made out the elements of its various affirmative defenses, one of which was the government contractor defense. The jury awarded plaintiffs $22.9 million in compensatory damages and no punitive damages.

After the district court entered judgment for the plaintiffs, UTC moved for judgment as a matter of law and, alternately, for a new trial. The district court denied UTC's motions on October 25, 2000. *Densberger v. United Technologies Corp.*, 125 F. Supp.2d 585 (D. Conn. 2000). On appeal, UTC argues, primarily, (1) that the jury found liability under a negligence-based post-sale duty to warn that is barred by the CPLA and, in any event, does not exist in Connecticut common law; (2) that, as a matter of law, UTC cannot be liable for failure to warn, as the Army knew of the relevant dangers; (3)

that UTC is entitled to a new trial because plaintiffs' engineering expert testified as to the legal scope of UTC's duty to warn; and (4) that the government contractor defense protects UTC from liability.

DISCUSSION

I

UTC contends that the jury, by rejecting the plaintiffs' failure to warn claims under the strict liability and implied warranty theories, necessarily found that the warnings provided to the Army *at the time of sale* were adequate. In finding UTC liable for failure to warn under the negligence theory, therefore, the jury must have based its verdict solely on a violation of a duty to warn *post-sale*. This is so, because, according to the jury instructions, such a duty exists only in negligence and cannot be the basis for recovery either in strict liability or for breach of an implied warranty.[3]

UTC further asserts that – contrary to the jury instructions – there is, in fact, no negligence-based post-sale duty to warn in Connecticut common law. And, if there ever had been such a duty, it is now barred by the CPLA, which according to UTC includes no post-sale obligation and is the exclusive source of a manufacturer's duty to warn in Connecticut. On this basis, UTC requests judgment as a matter of law.

We reject UTC's argument, and in so doing affirm the

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[3] The strict liability and breach of implied warranty jury charges both referred explicitly to the product at "the time of sale." The negligence jury charge, in contrast, stated that "[a] manufacturer has a duty to exercise reasonable care in the design, manufacture and sale of its products. Reasonable care is that degree of care which a reasonably prudent manufacturer would use under like circumstances. Further, *a manufacturer has a continuing duty to warn of all known or knowable dangers associated with using its product.*" (emphasis added)

district court's elegant analysis of the Connecticut common law and its relationship to the CPLA. First, it is clear, as the district court held, that the CPLA does not preempt all common law theories of product liability. Rather, as the exclusive basis for product liability claims under Connecticut law, the CPLA bars separate common law *causes of action* in product liability cases. *See, e.g., Winslow v. Lewis-Shepard, Inc.*, 212 Conn. 462, 562 A.2d 517, 521 (1989) (holding that the CPLA bars a separate negligence-based cause of action). Common law theories, however, rather than being preempted by the CPLA, are incorporated into the statute unless they are expressly inconsistent with it. *See, e.g., LaMontagne v. E.I. Du Pont De Nemours & Co., Inc.*, 41 F.3d 846, 855-56 (2d Cir. 1994) (*LaMontagne II*) (holding that because the CPLA does not delineate the specific elements of the claims that it consolidates, the common law continues to provide the bases for, and theories of, recovery under the act, and that "the CPLA . . . apparently was not meant to alter the substance of a plaintiff's rights or the facts that a plaintiff must prove in order to prevail"); *Lamontagne v. E.I. Du Pont de Nemours and Co.*, Inc., 834 F. Supp. 576, 587-89 (D. Conn. 1993) (*Lamontagne I*) (holding that the CPLA "certainly retains the plaintiff's right to allege the traditional theories of recovery along with the statutory basis for recovery under one unified count denominated as a 'product liability claim'" (internal quotation marks omitted)), *aff'd*, 41 F.3d 846 (2d Cir. 1994); *Vitanza v. Upjohn Co.*, 257 Conn. 365, 778 A.2d 829, 839-41 (2001) (holding that the common law "learned intermediary" defense remains available under the CPLA); *Potter v. Chi. Pneumatic Tool Co.*, 241 Conn. 199, 694 A.2d 1319, 1345 n. 34 (1997) (holding that the admissibility of state-of-the-art evidence in design defect claims remains available under the CPLA); *Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282, 627 A.2d 1288, 1293 (1993) (holding that a common-law claim for loss of consortium can be brought as part of a CPLA action).

UTC's more plausible argument is that even if some common law theories remain available under the CPLA, those that expressly conflict with the statute do not. The language of the CPLA, UTC contends, explicitly rules out any post-sale duty to warn. It is true that the text of the CPLA contains a discussion of duty to warn, which talks about that duty only at the time of manufacture. *See* § 52-572q(b) ("In determining whether instructions or warnings were required and, if required, whether they were adequate, the trier of fact may consider . . . the ability of the product seller to anticipate at the time of manufacture that the expected product user would be aware of the product risk . . .."). UTC argues that this express discussion necessarily precludes liability based on the absence of post-sale warnings, regardless of the theory of liability.[4] Again, we disagree. As the Connecticut Supreme Court has recently held in relation to CPLA preemption of the common law, "'[i]nterpreting a statute to impair an existing interest . . . is appropriate only if the language of the legislature *plainly and unambiguously* reflects such an intent.'" *Vitanza*, 778 A.2d at 840 (quoting *Ahern v. New Haven*, 190 Conn. 77, 459 A.2d 118, 121 (1983)) (emphasis added) (holding that because the learned intermediary defense is not explicitly abrogated by the CPLA, it remains available under the statute). Because the CPLA does not expressly prohibit post-sale liability for

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[4] In support, UTC cites *Sharp v. Wyatt Inc.*, 31 Conn. App. 824, 627 A.2d 1347, 1355 (1993), *aff'd*, 230 Conn. 12, 644 A.2d 871 (1994), a failure to warn case holding that the negligence theory of foreseeability cannot be imported into the CPLA, because it is inconsistent with the definition of causation as stated in § 52-572q(c). UTC also cites *Gajewski v. Pavelo*, 36 Conn. App. 601, 652 A.2d 509, 514 (1994), *aff'd* 236 Conn. 27, 670 A.2d 318 (1996), in which the Connecticut intermediate appellate court stated, in dicta, that if the jury had been instructed to use a common law negligence standard to determine whether the duty to warn had been violated, "there would be a reversible error."

negligent failure to warn, the negligence-based common law duty survives and is cognizable under the statute.

Significantly, the CPLA discusses the duty to warn in terms of product defect, that is, in terms of strict liability and liability for violation of implied warranties. *See* § 52-572q(a) ("A product seller may be subject to liability for harm caused to a claimant who proves by a fair preponderance of the evidence that the *product was defective* in that adequate warnings or instructions were not provided." (emphasis added)). The statute may therefore perhaps be read to establish standards for determining whether a product is *defective* due to a defendant's failure to warn; it does not, however, establish any standards for determining when and whether a defendant may be *negligent* in failing to warn. For these standards, we must look to the common law. "[A]lthough the [CPLA] addresses some substantive aspects of a product seller's duty to warn, it does not address all of the applicable elements necessary for recovery under that theory. Those elements must be derived from Connecticut common law." *Lamontagne I*, 834 F.Supp. at 588 (footnote omitted) (looking to Connecticut common law to determine whether there is a duty to warn in situations where the defendant neither knows, nor has reason to know, that the product is dangerous).

Also, notably, very shortly before the CPLA was passed in 1979, the Connecticut Supreme Court restated the Connecticut rule that while duty to warn for strict product liability is attributed only at the time of sale, duty to avoid negligence in failure to warn persists in post-sale situations. *See Prokolkin v. Gen'l Motors Corp.*, 170 Conn. 289, 365 A.2d 1180, 1185-1186 (1976); *see also Handler v. Remington Arms Co.*, 144 Conn. 316, 130 A.2d 793, 795 (1957) (finding post-sale duty to warn in negligence). Under the circumstances, we certainly cannot say that the CPLA's discussion of failure to warn "plainly and unambiguously" overturns what the Connecticut court had so

recently reaffirmed to be Connecticut law on this issue.

It follows that the post-sale duty to warn exists in negligence, and is cognizable under the CPLA. Therefore, to the extent the jury found UTC liable because of a breach of a post-sale duty to warn under negligence, the verdict is consistent with Connecticut law.

II.

UTC also contends that the Army's superior knowledge of the relevant dangers is "uncontroverted" in the record, and therefore that UTC is entitled to judgment as a matter of law because (1) there can be no breach of a duty to warn if the purchaser already knew of the dangers at issue, and (2), even if there were a breach, there can be no causation if the Army already knew of the dangers, and yet failed to warn its pilots or take other actions to avoid the danger. Alternately, UTC contends that Judge Hall erred by failing to advise the jury that UTC was not liable under the negligence theory for failing to warn the Army of dangers of which the Army was already aware.

We will reverse the denial of a Rule 50(b) motion "only if the evidence, drawing all inferences in favor of the non-moving party and giving deference to all credibility determinations of the jury, is insufficient to permit a reasonable juror to find in her favor." *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 479 (2d Cir. 2001). We agree with the district court that a reasonable jury could conclude from the evidence at trial in this case (a) that UTC knew or should have known that the helicopter could become uncontrollable in an asymmetric condition when equipped with the ESSS auxiliary tanks, and (b) that the Army did not have similar knowledge. UTC is therefore not entitled to judgment as a matter of law on this ground. We further hold that the district court properly permitted the jury to decide all the other issues of causation

raised by UTC.

The jury instruction issue is somewhat more complex. It is true that the court's charge on negligence[5] did not instruct the jury that – in the absence of unusual circumstances[6] – a prudent person need not inform people of those dangers that are

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[5] The negligence charge stated in relevant part:

> Negligence is the failure to use reasonable care. A manufacturer has a duty to exercise reasonable care in the design, manufacture and sale of its products. Reasonable care is that degree of care which a reasonably prudent manufacturer would use under like circumstances. . .. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.
>
> You must determine the question by placing an ordinarily prudent person in the situation of UTC and then ask yourselves, what would such a person have done? . . . "Reasonable care" is the care which such a person would have used under the surrounding circumstances, in view of the facts he or it knew or, as such a person should have perceived and known.
>
> The standard of care required, that of an ordinarily prudent person under the circumstances, never varies; but the degree of care may vary with the circumstances. All of the surrounding circumstances must be considered. In circumstances of slight danger a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of great danger a correspondingly great amount of care would be required to constitute reasonable care.

[6] These might, for example, include extraordinarily great danger, knowledge of a proximate category of users who are ignorant, continuing duty because of special relationship, etc.

generally known.[7] It is also true that the court's instruction on causation[8] did not specify that where the defendant's negligence consists in a failure to warn, a jury must find no cause, and therefore no liability, if the person who should have been warned would have acted in the same way had the warning in fact been given. Such charges would, doubtless, have been useful supplements to the instructions given. But, in the circumstances of this case, their absence does not warrant a new trial.

First, the instructions given were not erroneous; they were at most incomplete. And we will not upset a judgment on the

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[7] *But cf. Liriano v. Hobart Corp.*, 170 F.3d 264, 270 (2d Cir. 1999) (holding that, even if a danger is obvious, there may still be a duty to warn of the existence of a safer alternative that is *not* generally known).

[8] The charge on causation was as follows:

> In each of their three theories asserted under the Connecticut Products Liability Act, the plaintiffs must prove that UTC's action or inaction was the proximate cause of the injuries they suffered. "Proximate cause" simply means substantial factor. Product defect or negligence or breach of the implied warranty of merchantability is a proximate cause of any injury when it is a substantial factor in producing that injury. To be a substantial factor in producing the injury, product defect, negligence or breach of the implied warranty of merchantability must have entered into the production of the injury, as a cause of it. That is, in order to find the defendant liable, you must find that UTC's act or omission must either have caused the injury itself, alone, or it must have materially contributed to it in conjunction with other factors. This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor. On the contrary, many factors may operate at the same time, either independently or together, to cause injury or damage and, in such a case, each may be a proximate cause.

basis of jury instructions "if the charge actually given was correct and sufficiently covered the essential issues," as this charge did. *BAII Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 696 (2d Cir. 1993) (citing *Carvel Corp. v. Diversified Management Group, Inc.*, 930 F.2d 228, 231 (2d Cir. 1991)). Second, UTC did not expressly assert below that the instructions were wrong; rather it proposed alternate charges. But in order to succeed when challenging jury instructions in this way, the appellant must show that the requested charge "accurately represented the law in every respect." *United States v. Feliciano*, 223 F.3d 102, 116 (2d Cir. 2000) (quoting *United States v. Thompson*, 76 F.3d 442, 454 (2d Cir. 1996)). Since UTC's proposed jury instructions on the issue of the Army's knowledge contained errors of law, the district court did not err in refusing them.[9]

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[9] UTC proposed the following jury instructions, the first before the court charged the jury, the second in answer to the court's charge. Each contained incorrect statements of law:

> 1) Remember, for plaintiffs to prove their claims, they must establish by a preponderance of the evidence that if adequate warnings or instructions had been provided, the plaintiffs would not have suffered the harm. In other words, if you find, for example, that even if UTC provided the Army with adequate warnings, the Army would not have provided those warnings to the pilots of this helicopter, then you must find for the defendant UTC on the failure to warn claim.

"Defendant UTC's First Amended Proposed Jury Instructions," dated January 20, 2000.

> 2) A defendant cannot be held liable for a failure to warn about information already known to the product purchaser. If the Army knew information that plaintiffs allege should have been provided as a warning by UTC, even if UTC had a duty to warn the Army, it cannot be held liable for failing to warn of facts already known to the Army. UTC asserts that it had no duty to

Because the jury instructions on causation and negligence

> warn the Army about the hazards or dangers associated with use of the ESSS kit for purposes other than self-deployment and Hellfire missile demonstration because the Army and the United States Congress were well aware of those hazards and dangers, as exemplified by the Congressional report, Tailby memorandum and other documents and testimony.

"Additional Objections to Jury Instructions by Defendant UTC," dated June 8, 2000.

UTC's first proposed charge is incorrect because, after stating what might well be a correct instruction, it goes on to say that UTC would only be liable if, had it warned the Army, the Army would have *warned* the pilots. But in fact UTC would also be liable if, had UTC warned the Army, the Army would have taken any number of other available measures to avoid the accident, e.g., prevented the helicopters from being used in the manner that the warning revealed to be dangerous, or, without warning the pilots of certain dangers linked to the helicopter, instructed them on how to deal with certain eventualities were they to occur.

The second proposed instruction is no less flawed. It is wrong if one reads it as seeking to object to the charge with respect to the question of whether the defendant acted *unreasonably* in not warning. A defendant, for example, might well be unreasonable in failing to warn about information already known to the purchaser if the defendant was unaware that the purchaser had the information. The instruction is also wrong with respect to the causation issue, because it is possible that if the Army *had* been warned of the danger of which it already knew, it might have warned the pilots, and would have done so even if, absent a warning, it had failed to caution them. Thus, UTC's warning might have led the army to say, "Gee, if this danger (of which we're already aware) is important enough so that UTC decided to warn us of it, we'd better let the pilots know about it too." UTC's proposed charge ignores this, as well as other, similar, possibilities.

in this case were neither properly objected to nor plainly incorrect, no new trial is required.

III.

Plaintiff's expert Mel Vague, a retired helicopter engineer, offered the following testimony:

Q: Do you have an opinion, sir, as to whether or not, if a customer has some information about the use of its product, whether that relieves a reasonably careful manufacturer of taking steps to make sure that the aircraft is used safely?

. . . .

A: I believe that the manufacturer has an obligation to look out for their product, no matter whether the user has information or not.

Between the above-stated question and answer, defense counsel objected that the question called for a legal opinion. The objection was overruled.[10]

"It is a well-established rule in this Circuit that experts are not permitted to present testimony in the form of legal conclusions." *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994). But even the wrongful admission of expert testimony containing legal opinion does not necessarily require reversal. *See United States v. Bilzerian*, 926 F.2d 1285, 1295 (2d Cir. 1991) (no reversible error in admitting expert testimony explaining federal securities

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[10] UTC also cites Vague's statement that a customer should not have to tell the manufacturer what type of testing would be prudent, because "[i]f the manufacturer is prudent, he would suggest that those tests be run, but, you know, in a forceful manner." This statement was not objected to, however, and any objections to it were therefore forfeited. *See In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, 827 (2d Cir. 1994); Fed.R.Evid. 103(a)(1).

regulation and filing requirements where a limiting instruction was given to the effect that the judge alone would instruct the jury on the law). In the instant case, the trial judge properly advised the jury to follow the law, rather than the testimony of any witness: "You must take the law as I give it to you. If any attorney or any witness or any exhibit has stated a legal principle different from one that I state to you in these instructions, it is my instructions that you must follow." Under the circumstances, whether or not Vague's statement could be construed as presenting a legal conclusion, we find that the admission of the testimony was harmless.

Vague's testimony does not justify overturning the jury's conclusions.

IV.

Finally, UTC argues that it is entitled to judgment as a matter of law or to a new trial based on the so-called government contractor defense. UTC contends (1) that no reasonable juror could have found that UTC failed to meet its burden in proving this defense, and (2) that the district court erred in its jury charge on this issue. We very much doubt that the government contractor defense is relevant to this case, but even if it were, the jury charge on this issue was correct. Moreover, given that charge, a reasonable jury could conclude as it did.

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), the Supreme Court extended the immunity afforded to the federal government's discretionary functions under the Federal Tort Claims Act to government contractors, by allowing those contractors an affirmative defense to state law tort actions where a "significant conflict" exists between the requirements of state law and the contractor's obligations to the federal government. *Id.* at 512, 108 S.Ct. 2510. The affirmative defense applies only if the

government exercised significant control over the relevant actions of the contractor. In failure to warn cases, this means that the ultimate product users cannot sue the contractor for failure to warn if the government controlled which warnings the contractor was allowed to provide *to those users*, and thereby precluded the warnings at issue from being given. See *In re Joint Eastern and Southern District New York Asbestos Litigation (Grispo v. Eagle Picher Industries, Inc.)*, 897 F.2d 626, 630, 632 (2d Cir. 1990).[11]

All parties to the present action, however, have agreed that UTC had no duty whatsoever to warn the ultimate product users, *i.e.*, the pilots.[12] The failure-to-warn claim in this case is brought strictly with respect to UTC's duty to warn *the Army*. But the government contractor defense would seem to make sense only when the government, for reasons of federal interest, chooses to limit the warnings provided by the seller to *end-users*. It is hard to see why it should apply to limit the warnings that a reasonable seller would provide to the government itself.[13] It is not unlikely, therefore, that the

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[11] The three requirements of the *Boyle* test for failure-to-warn cases are: (1) "government control over the nature of product warnings"; (2) "compliance with the Government's directions"; and (3) "communication to the Government of all product dangers known to it but not to the Government." *Grispo*, 897 F.2d at 630 n. 4.

[12] This is because all parties agreed that, under the Connecticut learned intermediary doctrine, no such duty exists. Since the parties agree on this point, we need not consider whether they correctly interpret this Connecticut rule.

[13] Appellants argue that such a holding would be inconsistent with our decision in *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83 (2d Cir. 1993). This would be so only if there were a conflict (as Boyle requires for the defense to apply) between state and federal requirements in cases in which there is no duty to warn the end-users,

defense should not have been sent to the jury in the first instance.

Assuming, though, that the government contractor defense is relevant to the circumstances before us, appellant's arguments are still meritless. In *Grispo*, we held that, for the government contractor defense to succeed, the contractor must show "that the Government itself 'dictated' the content of the warnings meant to accompany the product," and further, "that the Government controlled or limited the ability of contractors . . . themselves to warn those who would come into contact with its product." *Grispo*, 897 F.2d at 630, 632. Unless the defendant demonstrated that control, the defense would not preclude recovery. We believe that, in the light of *Grispo*, the charge that was given to the jury on the government contractor defense in this case was essentially correct, J.A. 312-15, and neither the charge itself nor the jury's response to that charge warrants reversal.

V.

Since we find that UTC's rule 50(b) motion was properly be denied, and since we find no reversible error in how the case was sent to the jury, we AFFIRM the judgment of the district court.

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but only a duty to warn the government. It is quite plausible to say, however, that where the duty in question is a duty to warn only the government, there is no such conflict and hence that a defendant will not be able to pass the first prong of the *Boyle* test. Such an approach would not violate *Lewis*. 985 F.2d at 86-87. Moreover, even if one were to read a tension between this view and *Lewis*, *Lewis* might well not be binding because it dealt with a claim of liability for the design of a product, while this case deals with the quite different claim of negligent liability for failure to warn.

APPENDIX B
DISTRICT COURT OPINION

United States District Court,
D. Connecticut.

Kathleen DENSBERGER, Individually and as Executrix of the Estate of Colonel William Densberger, et al., *Plaintiffs*,
v.
UNITED TECHNOLOGIES CORPORATION, *Defendant*.

No. Civ.A. 3:96CV532JCH.

Oct. 24, 2000.

Francis G. Fleming, Brian J. Alexander, Kreindler & Kreindler, New York, NY, William R. Davis, Andrew S. Groher, Riscassi & Davis, P.C., Hartford, CT, Thomas J. Harlan, Jr., Harlan & Flora, Norfolk, VA, Robert F. Spohrer, Floyd L. Matthews, Sean B. Cronin, Spohrer, Wilner, Maxwell & Matthews, Jacksonville, FL, Donald Maciejewski, Zisser, Robison, Brown, Nowlis, & Maciejewski, Jacksonville, FL, for Kathleen Densberger, Eric Johnson.

William R. Davis, Andrew S. Groher, Riscassi & Davis, P.C., Hartford, CT, Thomas J. Harlan, Jr., Harlan & Flora, Norfolk, VA, Robert F. Spohrer, Floyd L. Matthews, Sean B. Cronin, Spohrer, Wilner, Maxwell & Matthews, Jacksonville, FL, Donald Maciejewski, Zisser, Robison, Brown, Nowlis, & Maciejewski, Jacksonville, FL, for Mary Ann Kelly, Lisa Rhodes Truluck, Deborah L. Robertson, Christopher Mancini, Wendy Mancini.

Francis H. Morrison, III, Day, Berry & Howard, Hartford, CT, Raymond Mariani, Dombroff & Gilmore, New York City, Mark A. Dombroff, Dombroff & Gilmore, Washington, DC, for

United Technologies Corp.

RULING ON DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW AND FOR A NEW TRIAL AND/OR ALTERATION OR AMENDMENT OF JUDGMENT [DKT. NO. 285]

HALL, District Judge.

This case involves the crash of a United States Army ESSS-equipped Blackhawk helicopter in Germany in 1993. The plaintiffs in this action are two men injured in the crash, including one of the helicopter's pilots, and the widows of four other men who died in the crash. The defendant is United Technologies Corporation ("UTC"), which manufactured the airframe and some component parts in its Sikorsky helicopter division of the product at issue: the Blackhawk helicopter bearing serial number 88-26059 sold and delivered to the Army by UTC, which helicopter was factory-equipped with hard points capable of accepting an ESSS kit, and an ESSS kit, which was also sold and delivered to the Army by UTC (without ESSS fuel tanks).[1]

The case involves a dispute over whether UTC manufactured a defective helicopter, and, if so, whether UTC should be held liable for the crash. The plaintiffs alleged that the aircraft was defective and negligently designed and manufactured in that it was dangerously unstable and not crashworthy. Specifically, the plaintiffs brought a cause of action under the Connecticut Product Liability Act ("CPLA") on the basis of three theories of liability: strict liability in tort, negligence, and breach of implied warranty of merchantability. Under each of these three theories of liability, the plaintiffs

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[1] This helicopter was equipped to carry two 230-pound tanks on each side of the helicopter, to provide substantially more fuel capacity for long-range travel and self-deployment.

proceeded on three factual allegations: 1) UTC failed to calculate a proper lateral center of gravity envelope for the ESSS-equipped Blackhawk helicopter sold and delivered to the Army by UTC; 2) UTC failed to warn the Army that this helicopter could become uncontrollable during foreseeable flight conditions; and 3) the helicopter that UTC manufactured and sold to the Army was not sufficiently crashworthy.

UTC denied the plaintiffs' allegations. UTC also raised four special defenses: the government contractor defense, superseding cause, alteration/modification, and comparative negligence.

Following trial, the jury returned a verdict for the plaintiffs on their cause of action under the CPLA on a negligence theory of liability based on the plaintiffs' factual allegation that "UTC failed to warn the Army that [the Blackhawk helicopter bearing serial number 88-26059 sold and delivered to the Army by UTC, which helicopter was factory-equipped with hard points capable of accepting an ESSS kit, and an ESSS kit, which was also sold and delivered to the Army by UTC (without fuel tanks)], could become uncontrollable during foreseeable flight conditions." Special Verdict Form (Dkt. No. 279) at ¶ 2(b). The jury found against UTC on its four special defenses. *Id.* at ¶¶ 5, 7-8, 10.

At the close of the plaintiffs' case-in-chief, UTC moved pursuant to Federal Rule of Civil Procedure 50(a) for judgment as a matter of law on the grounds of superseding causation or plaintiffs' failure to prove causation, and plaintiffs' lack of proof to support an award of punitive damages. Trial Tr. (Dkt. No. 257) at 1515. The court reserved on the motion. *Id.* at 1524. UTC then renewed its motion for judgment as a matter of law at the close of the evidence. Tr. of Motion Hearing on June 2, 2000 at 2. UTC now renews its motion for judgment as a matter of law, or motion for j.n.o.v., pursuant to Fed.R.Civ.P. 50(b)(1)(C) and seeks, in the alternative, a remittitur of certain

damage awards or a new trial under Fed.R.Civ.P. 59(a) and 59(e). *See* UTC's Motion for Judgment as a Matter of Law, New Trial, or Alteration or Amendment of Judgment (Dkt. No. 285). For the following reasons, the court denies UTC's motion.

I. Defendant's Motion for Judgment as a Matter of Law

A. Standard

Rule 50(b) of the Federal Rules of Civil Procedure allows for the entry of judgment as a matter of law if a jury returns a verdict for which there is no legally sufficient evidentiary basis. The standard under Rule 50 is the same as that for summary judgment: A court may not grant a Rule 50 motion unless "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *This Is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998) (citation and internal quotation marks omitted). Thus, in deciding such a motion, "the court must give deference to all credibility determinations and reasonable inferences of the jury . . . and it may not itself weigh the credibility of the witnesses or consider the weight of the evidence." *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998) (citations omitted). In short, the court cannot "substitute its judgment for that of the jury." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 429 (2d Cir. 1995) (citations omitted). Rather, judgment as a matter of law may only be granted if:

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or
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> (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and

> fair minded persons could not arrive at a verdict against it.

Galdieri-Ambrosini, 136 F.3d at 289 (quoting *Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1154 (2d Cir. 1994)) (internal quotation marks omitted).

Moreover, "weakness of the evidence does not justify judgment as a matter of law; as in the case of a grant of summary judgment, the evidence must be such that 'a reasonable juror would have been compelled to accept the view of the moving party.'" *This Is Me, Inc.*, 157 F.3d at 142 (quoting *Piesco v. Koch*, 12 F.3d 332, 341, 343 (2d Cir. 1993)). The court "must view the evidence in the light most favorable to the party in whose favor the verdict was rendered, giving that party the benefit of all reasonable inferences that the jury might have drawn in his favor." *Norton v. Sam's Club*, 145 F.3d 114, 118 (2d Cir. 1998) (citation omitted). Thus, "[a] party seeking to overturn a verdict based on the sufficiency of the evidence bears a very heavy burden." *Id.*

Furthermore, Rule 50(b) provides:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment--and may alternatively request a new trial or join a motion for a new trial under Rule 59.

Procedurally, then, "'[a] motion for j.n.o.v. is technically a renewal of a motion for a directed verdict.' . . . Thus, Federal Rule of Civil Procedure 50(b) generally proscribes judgment n.o.v. on any ground not specifically raised in an earlier motion

for a directed verdict at the close of all the evidence." *Doctor's Assocs., Inc. v. Weible*, 92 F.3d 108, 112 (2d Cir. 1996) (citations omitted).

In this case, UTC moved for judgment as a matter of law on two grounds at the close of the plaintiffs' case and again at the close of the evidence: superseding causation or plaintiffs' failure to prove causation, and the lack of proof to support punitive damages.[2] *See* Tr. of Motion Hearing on June 2, 2000 at 2; Trial Tr. (Dkt. No. 257) at 1515. The law of the Second Circuit is clear that, "if an issue is not raised in a previous motion for a directed verdict, a Rule 50(b) motion should not be granted unless it is 'required to prevent manifest injustice.'" *Cruz*, 34 F.3d at 1155 (citation omitted). The Second Circuit has further articulated the contours of the relationship between issues raised in motions for judgment as a matter of law at trial and post-trial:

> Under Rule 50(a), a party may move for judgment as a matter of law ("JMOL") during trial at any time prior to the submission of the case to the jury. Fed.R.Civ.P. 50(a)(2). The Rule requires the party making such a motion to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." *Id.* After an unfavorable verdict, Rule 50(b) allows the party to "renew" its motion. "The posttrial motion is limited to those grounds that were 'specifically raised in the prior motion for [JMOL]'"; the movant is not permitted to add new grounds after trial . . . .

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[2] The jury did not reach the issue of punitive damages because it answered "No" to the question: "Have the plaintiffs proven by a preponderance of the evidence that the harm suffered by them was the result of UTC's reckless disregard for the safety of product users?" Special Verdict Form (Dkt. No. 279) at ¶ 27.

> Although Rule 50(a) "does not define how specific" the motion must be, . . ., the purpose of requiring the moving party to articulate the ground on which JMOL is sought "is to give the other party an opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury," . . . . "The articulation is necessary . . . so that the responding party may seek to correct any overlooked deficiencies in the proof." Fed. R. Civ. P. 50 Advisory Committee Note (1991). Accordingly, the JMOL motion must at least identify the specific element that the defendant contends is insufficiently supported.

Galdieri-Ambrosini, 136 F.3d at 286 (citations omitted). In order to prevail on the instant motion, therefore, UTC must prevail on grounds sufficiently related to causation or grounds raised with sufficient specificity in the colloquy following each of UTC's motions for judgment as a matter of law "to alert the opposing party to the supposed deficiencies in [their] proof." *Id.* at 287. Otherwise, UTC must prove that judgment as a matter of law is required on other grounds to prevent "manifest injustice."[3] *Id.* (citing *Cruz*, 34 F.3d at 1155).

B. The court reaffirms its prior rejection of the premises of UTC's primary argument in support of its motion for judgment as a matter of law.

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[3] The court notes that this more restrictive standard for a Fed.R Civ.P. 50(b) motion raising new grounds was not briefed by the plaintiffs. However, the court will not deem the plaintiffs to have somehow consented to the application of the less restrictive standard of deciding a Rule 50(b) motion, because the requirement that the grounds for a post-verdict motion for judgment as a matter of law be raised in an earlier motion "may not be waived as a mere technicality." *Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1155 (2d Cir. 1994) (citation omitted).

UTC's argument in support of its motion for judgment as a matter of law primarily rests on three legal premises which the court previously considered and rejected before charging the jury in this case. Having reviewed UTC's motion and papers in support thereof and the record before the jury at trial, the court can find no reason to overturn its prior decisions on these issues.

First, the Connecticut Product Liability Act ("CPLA"), Conn. Gen. Stat. § 52-572m et seq., does not, as UTC has repeatedly claimed throughout this case, limit product liability actions to strict liability in tort. Rather, Conn. Gen. Stat. § 52-572n(a) provides that "[a] product liability claim as provided in sections 52-240a, 52-240b, 52-572m to 52-572q, inclusive, and 52-577a may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product." Section 52-572m(b) provides that the definition of "'[p]roduct liability claim' shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent." As the Second Circuit has observed:

> [t]he CPLA consolidates for most procedural purposes "all claims or actions brought for personal injury . . . caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product." Conn. Gen. Stat. Ann. § 52-572m(b) . . . . With the consolidation of all product liability claims into a single form of action, the CPLA became the "exclusive remedy for claims falling within its scope." *Winslow v. Lewis-Shepard,*

> *Inc.*, 212 Conn. 462, 471, 562 A.2d 517, 521 (1989). Thus, a plaintiff may not assert a cause of action against the seller of a product for harm caused by the product except within the framework of the CPLA. *See, e.g., Daily v. New Britain Machine Co.*, 200 Conn. 562, 571-72, 512 A.2d 893, 899 (1986).

LaMontagne v. E.I. Du Pont De Nemours & Co., Inc., 41 F.3d 846, 855 (2d Cir. 1994). However, the Second Circuit found, after reviewing Connecticut state court cases construing the CPLA, that, "[a]lthough the CPLA introduced simplified pleading, . . . , and created uniform rules for the various types of actions it encompasses, . . . , it apparently was not meant to alter the substance of a plaintiff's rights or the facts that a plaintiff must prove in order to prevail." *Id.* (citations omitted). The Court of Appeal noted that, "[i]n *Lynn v. Haybuster Manufacturing, Inc.*, 226 Conn. 282, 292, 627 A.2d 1288, 1293 (1993), the Connecticut Supreme Court stated that the intent of the legislature in enacting the CPLA, was 'to eliminate the complex pleading provided at common law: breach of warranty, strict liability and negligence,' rather than to 'creat[e] a wholly new right,' . . ., or to eliminate common-law substantive rights. . .." *Id.* at 856 (citations omitted); *see also Gajewski v. Pavelo*, 36 Conn. App. 601, 611 n. 11, 652 A.2d 509 (1994) ("Before the enactment of General Statutes § 52-572m et seq., complex pleading requirements required injured parties to plead their cases under the separate theories of breach of warranty, strict liability, and negligence." (citing *Lynn*, 226 Conn. at 292, 627 A.2d 1288)), *aff'd*, 236 Conn. 27, 670 A.2d 318 (1996). Thus, the Second Circuit concluded that, "[s]ince the CPLA was not meant to eliminate common-law substantive rights but does not itself spell out the elements of the types of claims it consolidates, we conclude that the district court was correct to assess plaintiffs' theories of recovery in light of the Connecticut common-law requirements."

LaMontagne, 41 F.3d at 856; *see also LaMontagne v. E.I. Du Pont de Nemours & Co., Inc.*, 834 F. Supp. 576, 587-89 (D. Conn. 1993) (Cabranes, J.), *aff'd*, 41 F.3d 846 (2d Cir. 1994) (discussing at length preservation of common law theories of liability under the consolidated CPLA cause of action).

UTC claims that the Connecticut Supreme Court rejected *LaMontagne* in *Gajewski v. Pavelo*, 236 Conn. 27, 670 A.2d 318 (1996), *aff'g* 36 Conn. App. 601, 652 A.2d 509 (1994). A subsequent decision by the Connecticut Supreme Court, however, repudiates UTC's claim. In *Potter v. Chicago Pneumatic Tool Co.*, the Connecticut Supreme Court cited *LaMontagne* with approval for the very proposition that UTC seeks to deny: "because [the CPLA] does not delineate elements of claims that it consolidates, common law provides [the] basis for theories of recovery." 241 Conn. 199, 245, 694 A.2d 1319 (1997) (citing *LaMontagne*, 41 F.3d at 856).

As to UTC's second premise, the CPLA preserves theories of recovery based on negligence while eliminating separate common law negligence causes of action in product liability suits. *See Am. Nat'l Fire Ins. Co. v. A. Secondino & Sons*, 832 F. Supp. 40, 42 (D. Conn. 1993). Contrary to UTC's repeated assertion, the CPLA does not abolish product liability on a negligence theory. Rather, as the Connecticut Supreme Court observed in Potter, "the legislature made it clear that, although the [CPLA] was intended to abolish various common-law causes of action and to consolidate them into one statutory claim, it was not intended to abolish all common-law considerations." *Potter*, 241 Conn. at 245, 694 A.2d 1319 (citing *inter alia*, *LaMontagne*, 41 F.3d at 855-56). As noted above, the plain language of the statute provides that a " '[p]roduct liability claim' include[s], but is not limited to, all actions based on the following theories: Strict liability in tort; negligence. . .." Conn. Gen. Stat. § 52-572m(b); *see also id.* § 52-572n(a) ("A product liability claim as provided in sections

52-240a, 52-240b, 52-572m to 52-572q, inclusive, and 52-577a may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product."). Thus, "plaintiffs are permitted to allege negligence in a claim based on the CPLA," so long as the plaintiffs' claims do not include "a separate common law claim alleging conduct which is covered by the [CPLA]." *Secondino*, 832 F. Supp. at 42. In accordance with these precedents, the court properly charged the jury to consider the plaintiffs' three theories of liability for strict liability in tort, negligence, and breach of implied warranty of merchantability, under one cause of action sounding in product liability under the CPLA. *See* Jury Charge (Dkt. No. 270) at 22-40.

Third, despite UTC's argument to the contrary, the CPLA preserves liability for a negligent breach of a manufacturer's continuing, post-sale duty to warn of known or knowable dangers associated with using its product. As discussed above, common law theories of liability and defenses are preserved under the CPLA where the statute does not expressly eliminate them. *See LaMontagne*, 41 F.3d at 856; *Potter*, 241 Conn. at 245, 694 A.2d 1319. Connecticut common law provided for liability for negligent breach of a post- sale duty to warn. *See, e.g., Prokolkin v. Gen'l Motors Corp.*, 170 Conn. 289, 301, 365 A.2d 1180 (1976). Conn. Gen. Stat. § 52-572m(b) clearly incorporates within the CPLA, but does not eliminate, liability for a "breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent." The court recognizes that Conn. Gen. Stat. § 52-572q addresses failure to warn claims under the CPLA.[4] However, Conn. Gen. Stat. § 52-572q

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[4] Conn. Gen. Stat. § 52-572q provides:

(a) A product seller may be subject to liability for harm caused to a claimant who proves by a fair preponderance of the

does not expressly indicate that the sole theory of liability for failure to warn under the CPLA arises only pre-sale or under strict liability in tort,[5] and neither the court nor the parties have identified any decisions holding to the contrary.[6] As such,

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evidence that the product was defective in that adequate warnings or instructions were not provided.

(b) In determining whether instructions or warnings were required and, if required, whether they were adequate, the trier of fact may consider: (1) The likelihood that the product would cause the harm suffered by the claimant; (2) the ability of the product seller to anticipate at the time of manufacture that the expected product user would be aware of the product risk, and the nature of the potential harm; and (3) the technological feasibility and cost of warnings and instructions.

(c) In claims based on this section, the claimant shall prove by a fair preponderance of the evidence that if adequate warnings or instructions had been provided, the claimant would not have suffered the harm.

(d) A product seller may not be considered to have provided adequate warnings or instructions unless they were devised to communicate with the person best able to take or recommend precautions against the potential harm.

[5] Conn. Gen. Stat. § 52-572q(b)(2), providing that, "[i]n determining whether instructions or warnings were required and, if required, whether they were adequate, the trier of fact may consider: . . . (2) the ability of the product seller to anticipate at the time of manufacture that the expected product user would be aware of the product risk, and the nature of the potential harm," does not expressly preclude liability for breach of a post-sale duty to warn under the CPLA.

[6] In fact, the court has located no cases directly on point, including *Gajewski v. Pavelo*, 36 Conn. App. 601, 652 A.2d 509 (1994), *aff'd*, 236 Conn. 27, 670 A.2d 318 (1996), and *Sharp v. Wyatt*, 31 Conn.

section 52-572q does not expressly define every duty to warn for which a manufacturer may be held liable under the CPLA, and, "[i]n the absence of any specific provision in the CPLA addressing the defendant's duty under such a theory, however, the test for establishing that element of a plaintiff[s'] case must be governed by the common law of Connecticut as it existed prior to the passage of the CPLA and as modified since the enactment of that statute." *LaMontagne*, 834 F. Supp. at 588 (footnote omitted), *aff'd*, 41 F.3d 846 (2d Cir. 1994).

Thus, the court charged the jury on the plaintiffs' factual allegation of a failure to warn under the strict liability, negligence, and breach of implied warranty theories of liability. *See* Jury Charge (Dkt. No. 270) at 22-40. However, because an element of strict liability required the jury to find that "the defect existed at the time of sale" and because an element of breach of implied warranty of merchantability required the jury to find that UTC sold goods "which were not merchantable at the time of sale," the court instructed the jury to consider

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App. 824, 627 A.2d 1347, *aff'd*, 230 Conn. 12, 644 A.2d 871 (1994). Thus, it is also true that no Connecticut court decisions have expressly affirmed liability under the CPLA for negligent breach of a continuing duty to warn. UTC's citation to a passing reference in the Connecticut Supreme Court's per curiam decision in *Sharp v. Wyatt* does not establish that there is no liability for negligent breach of a continuing duty to warn under the CPLA. *See* Reply Memo. of Law in Further Support of UTC's Motion for Judgment as a Matter of Law, New Trial, or Alteration or Amendment of Judgment (Dkt. No. 302) at 2 (quoting *Sharp*, 230 Conn. at 13, 644 A.2d 871 for the proposition that "Section 52-572q is '*the* warnings provision of Connecticut's product liability statute, General Statutes § 52-572q'" (emphasis in original)). The court notes that the discussion in the *Sharp* decisions focused upon a pre-sale duty to warn, not the post-sale failure to warn at issue in the instant case. *See, e.g.*, *Sharp*, 31 Conn. App. at 850, 627 A.2d 1347, *aff'd*, 230 Conn. 12, 644 A.2d 871.

UTC's liability for breach of a manufacturer's post-sale, "continuing duty to warn of all known or knowable dangers associated with using its product" under the plaintiffs' negligence theory of liability only. *See id.* at 23, 32, 34.

C. UTC has failed to sustain its burden in support of a motion for judgment as a matter of law.

Separated from these rejected premises, UTC's motion for judgment as a matter of law rests entirely on its claim that it has proven its compliance with any post-sale duty to warn and that it is entitled to judgment on the basis of its affirmative defenses as a matter of law. *See* Memo. of Law in Support of UTC's Motion for Judgment as a Matter of Law, New Trial, or Alteration or Amendment of Judgment (Dkt. No. 291) at 9-22. As noted above, a Rule 50(b) motion for judgment as a matter of law may be granted only if "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture," or if "there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded persons could not arrive at a verdict against it." *Galdieri-Ambrosini*, 136 F.3d at 289 (citation omitted). The court finds that UTC has failed to carry its "very heavy burden" to prove that either condition is present in this case. *Norton v. Sam's Club*, 145 F.3d at 118.

As to the plaintiffs' claim that UTC failed to fulfill its post-sale duty to warn, the jury had before it evidence of UTC's awareness of the use the Army was making of the ESSS-equipped Blackhawk helicopter. Moreover, the adequacy of the warning was a fact question for the jury to decide, and any warnings given were required to be devised to be understood by the Army. *See* Conn. Gen. Stat. § 52-572q(d); Jury Charge (Dkt. No. 270) at 27. The jury heard, and apparently rejected, the claims that UTC raises now regarding the Army's awareness of any potential dangers associated with the use of the ESSS kit with the Blackhawk helicopter for

purposes other than self-deployment and Hellfire missile demonstration. A reasonable jury could conclude from the evidence at trial that UTC and not the Army knew or should have known that the helicopter could become uncontrollable in an asymmetric condition when equipped with the ESSS kit. The court finds that UTC has failed to show, with regard to the plaintiffs' failure to warn allegations under their negligence theory of liability, that judgment as a matter of law is required to prevent a manifest injustice, either based on a complete absence of evidence supporting the verdict or such an overwhelming amount of evidence in favor of UTC that reasonable and fair minded persons could not arrive at a verdict against it.

With regard to UTC's special defenses, as the court instructed the jury, UTC had the burden of proof with regard to its government contractor defense and its alteration/modification defense.[7] *See* Jury Charge (Dkt. No. 270) at 41. UTC therefore must show that judgment as a matter of law is required to prevent a manifest injustice because the jury was presented with such an overwhelming amount of evidence in favor of UTC that reasonable and fair minded persons could not find in its favor on these defenses. This UTC has not done.

The court gave the jury the following charge on the government contractor defense with regard to the plaintiffs' allegations of a failure to warn:

> Plaintiffs' second factual allegation concerns product warnings, that is, warnings concerning controllability during foreseeable flight conditions. With regard to the first element of the government contractor

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[7] UTC does not, on the instant motion, challenge the jury's finding rejecting its superseding cause or comparative negligence special defenses.

defense, approval of specifications that are "reasonably precise" regarding warnings means that the government exercised control over significant details concerning the warnings UTC was required to and could provide about the "product."

Regarding the second element, that the "product" conformed to the specifications, with regard to plaintiffs' design defect allegations, UTC must prove that the lateral center of gravity limits of the "product" and its crashworthiness aspects conformed to the specifications. With regard to plaintiffs' failure to warn allegations, UTC must prove on this second element that the product warnings provided by UTC were required by the specifications as well as those warnings required of a seller (see pages 26 to 28) that were not, by the control or direction of the Army, prohibited. You may consider evidence in the case of documents which bear the signature of a government representative on the issue of compliance with government specifications, but it is not conclusive proof of such compliance.

With regard to the third element, UTC must prove it disclosed to the Army, or warned the Army of, those hazards involved in the use of the "product" that were actually known by UTC, but were not known by the Army. Whether UTC should have known of a hazard is not an issue that you are allowed to consider in connection with this third element of the special defense. The only thing that matters is actual knowledge. Disclosures of hazards must be communicated in a reasonably effective manner. If, however, the Army knew of a hazard, then UTC did not have a duty to warn or disclose that hazard to the Army.

Jury Charge (Dkt. No. 270) at 44-45. Because UTC bore the burden of proof for its government contractor defense, the jury could have chosen not to credit UTC's witnesses' testimony concerning one or more of these elements. A reasonable jury could have found, from the evidence presented at trial, that UTC did not provide any adequate warnings. The jury could have found that UTC should have advised the Army that, with the helicopter in an asymmetric condition, stick margins were degraded and the aircraft might become uncontrollable. Moreover, the jury could have credited the testimony of Charles Crawford that UTC was free to provide additional warnings to the Army. The jury could therefore have found that UTC failed to carry its burden of proof as to the second element of the government contractor defense because UTC did not prove that the Army's contract or specifications prohibited safety warnings beyond those provided by UTC.

With regard to UTC's alteration/modification defense, the jury was instructed:

> A manufacturer is not liable for harm that would not have occurred, but for a third party's alteration or modification of the product in question. "Alteration or modification," as used in the statute and in this charge, includes changes in the design, formula, function or use of the product from that originally designed, tested or intended by the product seller. In order to find that UTC is not liable, the alteration or modification must be the sole proximate cause of plaintiffs' injuries.
>
> UTC asserts that the Army altered or modified the "product" in that the ESSS system was originally designed, jettison tested and intended for two purposes: self-deployment so the aircraft could be flown to Europe and a demonstration of the Hellfire missile. UTC assets that, by the Army using the

> ESSS system for purposes other than these two, the Army altered or modified the ESSS system.
>
> This defense does not apply if the alteration or modification: 1) was in accordance with the manufacturer's instructions or specifications; 2) was made with the manufacturer's consent; or 3) was the result of conduct that the manufacturer reasonably should have anticipated. UTC asserts that it never instructed in, consented to, or anticipated that the ESSS system would be altered or modified.

Id. at 49-50. The jury heard evidence that UTC was aware that the Army was using the ESSS-equipped helicopter on an "everyday" basis. This would provide one basis on which a reasonable jury could find that UTC had failed to carry its burden of proof on its alteration/modification defense. Moreover, the jury could have found, based on the evidence presented at trial, that the crash was not caused by the Army's using the ESSS-equipped Blackhawk helicopter on an "everyday" basis.

The court finds that judgment as a matter of law is not required in UTC's favor because UTC has failed to establish that judgment as a matter of law is required in UTC's favor on its special defenses in order to prevent a manifest injustice. Accordingly, UTC's Motion for Judgment as a Matter of Law (Dkt. No. 285) is denied.

II. Defendant's Motion for Alteration or Amendment of Judgment and for a New Trial

A. Standards

Under Rule 59 of the Federal Rules of Civil Procedure, however, the standard of review is less stringent. Rather than being bound to construe the evidence in the light most favorable to the non-movant, the court may, on a Rule 59(a)

motion for a new trial, consider the credibility of the witnesses and the weight of the evidence. However, "[a] motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice."[8] *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 54 (2d Cir. 2000) (citation and internal quotation marks omitted). "Rulings on motions under [Rule 59(a)] are committed to the sound discretion of the district court." *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 143 (2d Cir. 1998) (citations omitted).

"Unlike a motion for judgment as a matter of law, a motion for a new trial may be granted even if there is substantial evidence to support the jury's verdict." *Caruolo*, 226 F.3d at 54 (citation and internal quotation marks omitted). "Also unlike a motion for judgment as a matter of law, a trial judge considering a motion for a new trial 'is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner.'" *United States v. Landau*, 155

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[8] The Second Circuit has also stated the following alternative test for deciding a motion for a new trial pursuant to Fed.R.Civ.P. 59(a):

> Rule 61 sets out a workable test for when to grant a new trial, counseling that no error is ground for granting a new trial "unless refusal to take such action appears to the court inconsistent with substantial justice." Fed.R.Civ.P. 61. That is to say, a trial court should be most reluctant to set aside that which it has previously decided unless convinced that it was based on a mistake of fact or clear error of law, or that refusal to revisit the earlier decision would work a manifest injustice. *See Arizona v. California*, 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). Certainly, a trial court should not grant a new trial simply because, like the proverbial second bite at the apple, the losing party believes it can present a better case if afforded another chance.

LiButti v. United States, 178 F.3d 114, 118-19 (2d Cir. 1999).

F.3d 93, 104 (2d Cir. 1998) (citation omitted). Nevertheless, "[w]here the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial." *Metromedia*, 983 F.2d at 363 (citations omitted).

In addition to the provision under Fed.R.Civ.P. 59(a) for a motion for a new trial, "Rule 59(e) provides for the altering or amending of a judgment." *Devlin v. Transp. Communications Int'l Union*, 175 F.3d 121, 131 (2d Cir. 1999) (citation omitted). "It is well-settled that Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" *Sequa*, 156 F.3d at 144 (citations omitted). Rather, the primary grounds for granting a Rule 59(e) motion to alter or amend are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (citations and internal quotation marks omitted); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE CIVIL 2D § 2810.1 at 121-28 (1995). "A district court has broad discretion in determining whether to grant a motion to alter or amend the judgment." *Baker v. Dorfman*, 239 F.3d 415, 427 (2d Cir.2000) (citing *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983) (per curiam)).

B. The jury's verdict is not against the weight of the evidence.

UTC argues that, "[e]ven if the Court concludes that there was legally sufficient evidence to send the case to the jury, the jury's verdict is so far against the weight of the evidence that the interests of justice demand a new trial." Memo. of Law in Support of UTC's Motion for Judgment as a Matter of Law, New Trial, or Alteration or Amendment of Judgment (Dkt. No.

291) at 22. The court notes that it "has . . . discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (citation and internal quotation marks omitted); *see also DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir. 1998). However, here, as outlined above, the court finds that there is ample evidence in the record to support the jury's verdict. Even after weighing the credibility of the witnesses itself, the court finds that the testimony of the plaintiffs' witnesses would support the jury's verdict.

Reviewing the evidence presented at trial, the court finds that there is substantial, credible evidence presented at trial to support the jury's verdict for the plaintiffs on their negligent failure to warn theory and against UTC on its special defenses. The court is not persuaded by UTC's attempts to characterize the evidence in its favor and will not second-guess the jury's credibility judgments regarding the fact issues supporting a finding of negligent failure to warn. The court is simply not convinced that the jury reached a seriously erroneous result or that the verdict is a miscarriage of justice. As such, UTC's motion for a new trial on the basis that the jury's verdict is against the weight of the evidence is denied.

C. The jury's verdict is not inconsistent.

A Rule 59(a) motion for new trial is also an appropriate vehicle for a defendant to challenge a jury verdict on the ground that it is inconsistent. *See Hardy v. Saliva Diagnostic Sys., Inc.*, 52 F. Supp.2d 333, 339-40 (D. Conn. 1999). This ground for a new trial arises from the requirement that, "[w]hen a jury returns a verdict by means of answers to special interrogatories, the findings must be consistent with one another, as they form the basis for the ultimate resolution of the action." *Crockett v. Long Island R.R.*, 65 F.3d 274, 278 (2d Cir. 1995) (citation omitted). "When confronted with a

potentially inconsistent jury verdict, the court must 'adopt a view of the case, if there is one, that resolves any seeming inconsistency.'" *Turley v. Police Dep't of the City of N.Y.*, 167 F.3d 757, 760 (2d Cir. 1999) (citation omitted). "Before a court may set aside a special verdict as inconsistent and remand the case for a new trial, it must make every attempt 'to reconcile the jury's findings, by exegesis if necessary.'" *Id.* (citations omitted); *see also Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 497 (2d Cir. 1995) ("A court's role is to reconcile and preserve whenever possible a seemingly inconsistent jury verdict." (citations omitted)). Thus, "if the answers returned by the jury appear to be inconsistent with one another, '[i]t is the duty of the district court to attempt to harmonize the jury's answers, if it is at all possible under a fair reading of the responses.'" *LeBlanc-Sternberg*, 67 F.3d at 427 (citation omitted). "The court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, . . ., and if there is any way to view a case that makes the jury's answers to the special verdict form consistent with one another, the court must resolve the answers that way even if the interpretation is strained." *McGuire*, 1 F.3d at 1311 (citations omitted). "The district court should refer to the entire case and not just the answers themselves." *Id.* (citation omitted). This duty "derives from the Seventh Amendment's obligation on courts not to recast factual findings of a jury, . . ., and is based on the notion that 'juries are not bound by what seems inescapable logic to judges.'" *Indu Craft*, 47 F.3d at 497 (citations omitted). "If, however, 'the jury's answers cannot be harmonized rationally, the judgment must be vacated and a new trial ordered.'" *Crockett*, 65 F.3d at 278 (citation omitted).

Where "the district court properly instructed the jury on the elements of plaintiffs' causes of action," the Second Circuit has held that "[t]here is a strong presumption that the jury in reaching its verdict complied with those instructions."

Bingham v. Zolt, 66 F.3d 553, 563 (2d Cir. 1995) (citation omitted). As such, "[a] jury's verdict reached after proper instructions must be upheld where there is a reasonable explanation for the jury's seemingly inconsistent answers." *Id.* Moreover, "[i]n seeking consistency, [the court must] bear in mind that a jury is entitled to believe some parts, and to disbelieve other parts, of the testimony of any given witness." *Robinson v. Cattaraugus County*, 147 F.3d 153, 160 (2d Cir. 1998) (citations omitted).

The court has already discussed above its charge instructing the jury that UTC could be held liable for breaching a post-sale duty to warn on the plaintiffs' negligence theory of liability under the CPLA, but not under the plaintiffs' strict liability or breach of implied warranty theories of liability. This distinction provides a reasonable reading of the jury's responses on the Special Verdict Form [Dkt. No. 279]. The jury could find that UTC, but not the Army, was aware, or could have been aware, post-sale of the danger that the ESSS-equipped Blackhawk helicopter could become uncontrollable in asymmetric conditions. This would support a finding that UTC breached its duty to warn only under a negligence theory of liability. Moreover, such a view of the case would preclude the jury from finding for UTC on either UTC's alteration/modification defense, since the jury could conclude the danger was the result of conduct that UTC reasonably should have anticipated, or UTC's government contractor defense, if the jury found that UTC failed to provide adequate warnings of the hazards involved in the use of ESSS-equipped Blackhawk helicopter that were actually known by UTC, but were not known by the Army. Accordingly, the court declines to order a new trial on the ground that the jury's verdict is inconsistent.

D. The court will not order a remittitur of the damages awarded to Christopher and Wendy Mancini and

Major Eric Johnson.

Finally, UTC argues that the court should order a remittitur to reduce the amount of the damages awarded to plaintiffs Christopher Mancini, his wife Wendy Mancini, and Major Eric Johnson. The jury awarded Christopher Mancini compensatory damages of $7,750,000, his wife Wendy compensatory damages for loss of consortium in the amount of $500,000, and Major Johnson $5,000,000 in compensatory damages. *See* Special Verdict Form (Dkt. No. 279) at ¶¶ 19-21. UTC argues that the non-economic damages awarded to the Mancinis and Major Johnson are excessive as a matter of law and that the damage awards of Christopher Mancini and Major Johnson should also be reduced by the $50,000 that these plaintiffs received in a pre-trial settlement with Alcoa, UTC's one- time co-defendant.[9] The court declines to do so.

A district court's discretion to order a new trial "includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Gasperini*, 518 U.S. at 433, 116 S.Ct. 2211 (citation and footnote omitted). "[I]n deciding remittitur motions in diversity cases, federal courts apply federal procedural standards and state substantive law." *Imbrogno v. Chamberlin*, 89 F.3d 87, 90 (2d Cir. 1996) (citations omitted). The court ruled before the start of trial that damages in the case would be governed by Connecticut law for all the plaintiffs except for Lisa Rhodes Truluck, both in her individual capacity and as executor of the Estate of Specialist Gary Rhodes, Jr. Thus, in deciding on UTC's request for a remittitur, the court must "look[ ] to Connecticut substantive law to determine whether the jury award was excessive" as a

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[9] For reasons discussed more fully below, the court interprets UTC's motion regarding a reduction for the pre-trial settlements with Alcoa as applying only to Christopher Mancini and Major Eric Johnson.

matter of law in comparison to other non-economic damage awards in similar case and "in light of the plaintiffs' settlement with" Alcoa. *Id.* "Under Connecticut law; a court may grant remittitur only when the jury verdict is excessive as a 'matter of law.'" *Id.* (citing *Peck v. Jacquemin*, 196 Conn. 53, 69, 491 A.2d 1043 (1985), and *Mauro v. Yale-New Haven Hosp.*, 31 Conn. App. 584, 587- 88, 627 A.2d 443 (1993)).

Federal law, however, governs the procedure governing remittitur motions. In this context, the Second Circuit has held that, "[i]f the district court concludes, after examining and comparing similar jury awards in Connecticut, that the verdict in the instant case is excessive as a matter of law, it should order a new trial on the issue of damages, unless the plaintiffs agree to remit that portion of the jury verdict deemed excessive." *Id.* (citations omitted).[10]

With regard to the effect of a prior settlement on a jury's damage award to the plaintiffs, Conn. Gen. Stat. § 52-216a provides:[11]

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[10] Accordingly, the court finds that the Second Circuit has foreclosed the court from finding that Fed.R.Civ.P. 59(e) dictates that the court should simply reduce the amounts of the damages awarded to each plaintiff, as UTC claims. *See* Memo. of Law in Support of UTC's Motion for Judgment as a Matter of Law, New Trial, or Alteration or Amendment of Judgment (Dkt. No. 291) at 31 & n. 30. As such, the court will follow UTC's express request that, "[i]f . . . the Court concludes that any adjustment for the Alcoa settlements must be done by remittitur, UTC seeks such relief only as to Mancini and Johnson." *Id.* at 31 n. 30. Thus, because the court finds that it must apply a remittitur and not a simple reduction, the court will consider UTC's request for a remittitur of the damages awarded to Christopher Mancini and Major Johnson, and not the other plaintiffs.

[11] In accordance with the express terms of this statute, the court granted a pre-trial motion in limine by the plaintiffs to exclude

> An agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action shall not be read to a jury or in any other way introduced in evidence by either party at any time during the trial of the cause of action against any other joint tortfeasors, nor shall any other agreement not to sue or release of claim among any plaintiffs or defendants in the action be read or in any other way introduced to a jury. If the court at the conclusion of the trial concludes that the verdict is excessive as a matter of law, it shall order a remittitur and, upon failure of the party so ordered to remit the amount ordered by the court, it shall set aside the verdict and order a new trial.

As the Connecticut Appellate Court has aptly summarized in *Mauro v. Yale-New Haven Hosp.*, the Connecticut Supreme Court held in *Peck v. Jacquemin* that section 52-216a should be interpreted to "permit[ ] the verdict to be reduced by amounts received by a plaintiff from other joint tortfeasors only when those additional amounts plus the verdict would produce an excessive amount of damages as a matter of law." *Mauro*, 31 Conn. App. at 588, 627 A.2d 443; *see also Peck*, 196 Conn. at 71, 491 A.2d 1043 ("In making its postverdict determination on the issue of any claimed excessiveness or inadequacy, the trial

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evidence at trial of the plaintiffs' pre-trial settlement with Alcoa. *See* Plaintiffs' Motion in Limine Regarding Prior Settlement and Incorporated Memorandum of Law (attached as Ex. 3 to Joint Pre-Trial Order [Dkt. No. 171]); *see also* UTC's Memorandum of Law in Opposition to Plaintiffs' Motion in Limine Regarding Prior Settlement (Dkt. No. 173) at 1 ("UTC does not oppose plaintiffs' motion with respect to excluding evidence of settlement with Alcoa from the jury. However, if plaintiffs prevail at trial on liability and are awarded damages, UTC will seek a reduction of the verdict by the Court based on plaintiffs' settlement with Alcoa.").

court was directed to consider the amount of money paid to a plaintiff as the result of either '[any] agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action.'" (quoting Conn. Gen. Stat. § 52-216a)). Following *Peck*, courts have held that, under this statute, the court must "determine if the jury verdict, when added to the settlement, was excessive as a matter of state law." *Imbrogno*, 89 F.3d at 90 (citations omitted); see also *Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 167-68, 681 A.2d 293 (1996) (affirming a trial court's application of this procedure for deciding on remittitur); *Hoffman v. McNamara*, 688 F. Supp. 830, 834 (D. Conn. 1988) ("In fact, Conn. Gen. Stat. § 52-216a requires that: '[i]n making its post verdict determination on the issue of any claimed excessiveness or inadequacy, the trial court [is] directed to consider the amount of money paid to a plaintiff as the result of either "[any] agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action."'" (quoting *Peck*, 196 Conn. at 71, 491 A.2d 1043 (quoting Conn. Gen. Stat. § 52- 216a))).

UTC, however, claims that the Connecticut Supreme Court's holding in *Alfano v. Ins. Ctr. of Torrington*, 203 Conn. 607, 525 A.2d 1338 (1987), abrogated the Connecticut Supreme Court's prior interpretation of the operation of section 52-216a in *Peck v. Jacquemin*, 196 Conn. at 69-71, 491 A.2d 1043. UTC argues that *Alfano* requires the court to order an automatic reduction of a jury verdict by the amount of any pre-trial settlement as a matter of law, obviating any need for the court to engage in an excessiveness analysis. UTC relies on the Connecticut Supreme Court's finding in *Alfano* that:

> [i]t can hardly be disputed that in this case the award of $19,500 to the plaintiff was excessive as a matter of law, because, when the $15,000 received in the settlement with his attorney is added to that sum, the

> plaintiff would receive total compensation of $34,500. This amount is $4500 greater than the jury's finding of $30,000 as the amount of the plaintiff's loss from the fire.

203 Conn. at 611, 525 A.2d 1338.

In assessing UTC's argument, the court finds the reasoning of the Connecticut Appellate Court in *Mauro* persuasive and thus rejects UTC's claim. *See* 31 Conn. App. at 588-89, 627 A.2d 443 (finding that the rule in *Peck* was not altered by the holdings of *Alfano*, 203 Conn. 607, 525 A.2d 1338; *Ames v. Sears, Roebuck & Co.*, 206 Conn. 16, 536 A.2d 563 (1988), and *Yuzari v. S. Auto Sales*, 688 F. Supp. 825 (D. Conn. 1988)). The Appellate Court in *Mauro* distinguished the holding of *Alfano* by noting that:

> *Peck* involved a jury award for damages for personal injuries while *Alfano* involved a jury award for a fire loss to property. The payment made by another in *Alfano* was not by a joint tortfeasor but by an attorney, arising out of his malpractice for failing to advise the plaintiff of the need for fire insurance. The loss in *Alfano* was readily ascertainable and absolute, and "represent[ed] a legally unassailable determination of fair compensation for the plaintiff's loss. . . ." . . . Although the amount of the jury award in *Peck* was certain, it was not absolute because it was within a spectrum of possible sums that could be awarded as just damages. . .. Because of the nature of personal injuries and the pain and suffering ancillary to the injuries, the amount awarded by a jury is not absolute. The amount of the loss in *Alfano* was fixed, and, therefore, any recovery beyond the jury verdict would necessarily be excessive. Thus, there was no reason for the court in *Alfano* to exercise the limited role given to it by §

52-216a.

31 Conn. App. at 589, 627 A.2d 443 (citations and footnote omitted). Indeed, the *Alfano* court itself noted that, "*[u]nder the unique circumstances of this case*, the choice made by the trial court in order to comply with the statutes directing a remittitur before ordering a new trial where a verdict is excessive was appropriate." 203 Conn. at 615, 525 A.2d 1338 (emphasis added) (citation omitted). The court's reliance on the reasoning of *Mauro* in distinguishing *Alfano* from *Peck* and the instant case is further bolstered by the Connecticut Supreme Court's decision in *Black*, 239 Conn. at 167-68, 681 A.2d 293, in which the Supreme Court affirmed a trial court's decision denying a remittitur of damages based on personal injuries after applying the *Peck* procedure. Accordingly, the court finds that the holding of the court in *Alfano*, finding that a remittitur was required because the sum of a settlement and jury verdict was excessive as a matter of law, should be limited to the facts of that case or at least to cases involving finite sums, such as property damage, and not matters involving non-economic damages for personal injury, such as pain and suffering.

Turning to the excessiveness inquiry in the instant case, both as a matter of law and as to a possible reduction by the amount of the Alcoa settlement, the court observes that, in determining if a damage award is excessive, the Connecticut Supreme Court has held that:

> [t]he amount of a damage award is a matter peculiarly within the province of the trier of fact, in this case, the jury. . .. The size of the verdict alone does not determine whether it is excessive. "The only practical test to apply to this verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced

by partiality, prejudice, mistake or corruption."

Gaudio v. Griffin Health Servs. Corp., 249 Conn. 523, 551, 733 A.2d 197 (1999) (citations omitted); *see also Ham v. Greene*, 248 Conn. 508, 536, 729 A.2d 740 (1999) (quoting *Mather v. Griffin Hosp.*, 207 Conn. 125, 138-39, 540 A.2d 666 (1988)). As the Connecticut Appellate Court has summarized, " '[t]he amount of damages in any given case is dependent on the facts and circumstances of that case.'" *Marchetti v. Ramirez*, 40 Conn. App. 740, 750, 673 A.2d 567 (1996) (quoting *Wochek v. Foley*, 193 Conn. 582, 587, 477 A.2d 1015 (1984)). "An award by a jury may range from penurious to generous and may be set aside only when it is contrary to the law or evidence." *Id.* (citing *American National Fire Ins. Co. v. Schuss*, 221 Conn. 768, 774, 607 A.2d 418 (1992)). Thus, a jury verdict's damage "award should be sustained if it does not shock the sense of justice or the conscience of the court." *Id.* (citing *Herb v. Kerr*, 190 Conn. 136, 139, 459 A.2d 521 (1983)). "The award of damages for pain and suffering is peculiarly within the province of the trier, and will be sustained, even though generous, if it does not shock the sense of justice." *Manning v. Michael*, 188 Conn. 607, 616, 452 A.2d 1157 (1982) (citing *Camp v. Booth*, 160 Conn. 10, 12-13, 273 A.2d 714 (1970)).

Applying this standard, the court finds that the non-economic damages awarded to the Mancinis and Major Johnson are not excessive as a matter of law. Moreover, in accordance with Conn. Gen. Stat. § 52-216a, as interpreted by the Connecticut Supreme Court in *Peck*, the court finds that the sum of $50,000 added to Christopher Mancini's and Major Johnson's damage awards does not shock the court's sense of justice and therefore will not support a remittitur.

Under Connecticut law, "[a] plaintiff is entitled to recover as damages 'the award of an amount based on the destruction of the capacity to carry on life's activities, as well as compensation for conscious pain and suffering.'" *Bartholomew*

v. Schweizer, 217 Conn. 671, 686, 587 A.2d 1014 (1991) (citations omitted). For an award of non-economic damages for past and future pain and suffering, "[p]roper compensation cannot be computed by a mathematical formula, and there is no iron-clad rule for the assessment of damages." *Manning*, 188 Conn. at 616, 452 A.2d 1157 (citation omitted).

In the instant case, the court instructed the jury, with regard to damages for Christopher Mancini and Major Johnson, that, "[i]n personal injury actions, damages are assessed up to the date of trial, and include medical expenses as well as all future, as well as past, pain and suffering." Jury Charge (Dkt. No. 270) at 68. The court then gave the following charge, in full, on these plaintiffs' non-economic damages:

> Plaintiffs Christopher Mancini and Major Eric Johnson also claim damages for the injuries they received, for their pain and suffering, and for their reduced ability to pursue and enjoy life's activities. The rule is that, insofar as money can do it, the plaintiffs are to be awarded fair and just compensation for the injuries they have suffered. It is for you, in the exercise of your best judgment, to say what is fair and just compensation to them. There is no fixed rule you can apply. You have to apply sound common sense in determining the amount of your verdict. If you find that the defendant is liable in this case, you must award fair, just, and reasonable damages to these two plaintiffs for any pain and suffering they have experienced from February 23, 1993, to today, as a proximate result of the UTC's conduct. Also, you must award compensation to each of these two plaintiffs for this element of damages for any pain and suffering that they will experience for the remainder of his life as a result of this incident. Pain and suffering are proper

elements of an injured party's damages that you are to consider. I instruct you that, in addition to physical pain, emotional anguish is also compensable.

Plaintiffs Christopher Mancini and Major Eric Johnson also seek compensation for the disruptions on their ordinary life activities caused by their injuries. They claim they will suffer from the after-effects of their injuries for the rest of their lives. If you are convinced of such disruption by a preponderance of the evidence, then you should award damages for these permanent injuries.

To establish a claim of physical pain and suffering or of mental anguish or suffering, the plaintiffs must prove by a preponderance of the evidence that a plaintiff suffered such type of damages. The determination of the amount of these damages is solely within your province.

In determining all future damages, you should take into account the probable duration of each plaintiff's life. You should also consider the particular condition of strength, health, and physical stamina as bearing upon the probable duration of their lives, whether longer or shorter than the average persons in like circumstances.

Wendy Mancini has also asserted a loss of consortium claim as a consequence of her husband's injuries. This claim is separate from the claims made by her husband, Christopher Mancini. The term "consortium" is defined as encompassing the services of the injured spouse, and the variety of intangible relations which exist between spouses living together in marriage. These intangibles are generally

> described in terms of affection, society, companionship, and sexual relations.

Id. at 68-70.

The court observed the testimony of all the witnesses at trial, including the Mancinis and Major Johnson. There was substantial witness testimony of the pain and suffering of the plaintiffs and direct evidence of the condition that both Christopher Mancini and Major Eric Johnson have endured and continue to endure. The jury both heard and saw ample evidence of the condition of both men following the crash of the Blackhawk helicopterand up to and including the time of trial.[12] Both men suffered second- and third-degree burns to several parts of their bodies, and their faces were seriously injured. Both men have undergone extensive reparative and plastic surgery. Both men's injuries have had a substantial effect on their ability to carry out the activities in which they engaged prior to the accident. Moreover, Wendy Mancini testified to the physical and psychological pain and suffering her husband has experienced.

The damage awards in the Connecticut cases cited by UTC in its Memorandum of Law in Support of its Motion for Judgment as a Matter of Law, New Trial, or Alteration or Amendment of Judgment [Dkt. No. 291] do not change the court's conclusion that the damages awarded to these plaintiffs are not excessive as a matter of law. *See* Memo. of Law in Support of UTC's Motion for Judgment as a Matter of Law, New Trial, or Alteration or Amendment of Judgment (Dkt. No. 291) at 25-31 (collecting cases). Having heard the witnesses' testimony at trial and seen Christopher Mancini's and Major Johnson's conditions at trial and in photographs, the court finds

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[12] There are photographs in the record depicting Christopher Mancini's and Major Johnson's condition prior to trial and closer to the time of the crash.

"that the jury's award[s] may have been generous, but that they nevertheless fall[ ] 'somewhere within the necessarily uncertain limits of just damages.'" *Bartholomew*, 217 Conn. at 688-89, 587 A.2d 1014.

Moreover, the addition of $50,000 from the plaintiffs' pre-trial settlement with Alcoa to both the $5,000,000 awarded to Major Johnson and the $7,750,000 awarded to Christopher Mancini does not alter the court's judgment that these damage awards are not excessive. The court finds that $5,050,000 and $7,800,000 as compensation for the past and ongoing injuries and pain and suffering endured by Major Johnson and Christopher Mancini, respectively, as described above, fall well within the range of just damages and do not in any way shock the court's conscience and sense of justice. Accordingly, the court will decline UTC's request for a remittitur in this case.

III. CONCLUSION

The court finds that UTC has failed to carry its burden of demonstrating its entitlement to judgment as a matter of law or, alternatively, to a remittitur or new trial. As such, UTC's motions for judgment as a matter of law under Rule 50(b) and, alternatively, for a new trial under Rule 59(a) and to alter or amend the judgment under Rule 59(e) [Dkt. No. 285] is DENIED.

SO ORDERED.

APPENDIX C

DISTRICT COURT'S JURY INSTRUCTION ON NEGLIGENCE

XVI. NEGLIGENCE

The plaintiffs' second theory of liability under the Connecticut Product Liability Act is negligence. The broad principal of law which lies at the basis of negligence liability is this: Where the activities of two persons or entities come into such conjunction that, unless proper care is used, injury is likely to occur, each must use such care to avoid the injury.

For the plaintiffs to recover under this theory of negligence, the plaintiffs must prove the following by a preponderance of the evidence. First, they must prove that UTC was negligent, in one or more of the ways they claim, in its design and manufacture of the "product." The plaintiffs have alleged that UTC was negligent in three ways: 1) by failing to calculate a proper lateral center of gravity envelope for the "product;" 2) by failing to warn the Army that the "product" could become uncontrollable during foreseeable flight conditions; and 3) by failing to manufacture a "product" that was sufficiently crashworthy. If the plaintiffs prove by a preponderance of the evidence any one or more of these ways constituted negligent conduct, they have proven this first element. Second, the plaintiffs must prove that such negligence, if any, was a proximate cause of the injuries and deaths that resulted.

Negligence is the failure to use reasonable care. A manufacturer has a duty to exercise reasonable care in the design, manufacture and sale of its products. Reasonable care its that degree of care which a reasonably prudent manufacturer would use under like circumstances. Further, a manufacturer

has a continuing duty to warn of all known or knowable dangers associated with using its product. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

You must determine the question by placing an ordinarily prudent person in the situation of UTC and then ask yourselves, what would such a person have done? (Of course, when I use the word "person" here, I mean as well an entity, like UTC.) "Reasonable care" is the care which such a person would have used under the surrounding circumstances, in view of the facts he or it knew or, as such a person should have perceived and known.

The standard of care required, that of an ordinarily prudent person under the circumstances, never varies; but the degree of care may vary with the circumstances. All of the surrounding circumstances must be considered. In circumstances of slight danger a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of great danger a correspondingly great amount of care would be required to constitute reasonable care.

If the plaintiffs do not prove each of the two elements of their negligence theory of liability by a preponderance of the evidence, then you should find in favor of UTC on this theory. If the plaintiffs have proven by a preponderance of the evidence each of the elements of a negligence theory of liability, then you must consider UTC's special defenses to this theory.

APPENDIX D

DISTRICT COURT'S JURY INSTRUCTION ON THE GOVERNMENT CONTRACTOR DEFENSE

XXI. GOVERNMENT CONTRACTOR DEFENSE

UTC first asserts what is known as the government contractor defense. The "product" was manufactured by UTC for the Army. A company like UTC that manufactures products for the Army, which is part of the United States government, is not liable to these plaintiffs, even if they have proven a claim against UTC, if UTC proves each of the following three elements of the government contractor defense. First, the government approved reasonably precise specifications for the product. Second, the equipment conformed to those specifications. Third, UTC warned the government about the dangers in the use of the equipment that were actually known to it, but which were not known to the government. In order to establish this defense, UTC must prove each of these elements by a preponderance of the evidence.

UTC asserts that the Army approved and issued reasonably precise specifications. UTC further asserts that all specifications were met, including for lateral center of gravity, for warnings, and for crashworthiness through testing specified and approved by the Army. Finally, UTC asserts that the Army was fully aware of all dangers or hazards associated with use of the "product."

Turning to the first element, whether the government approved of specifications that were reasonably precise, you should use your common sense and everyday experiences to determine that fact. The government need not write the specifications itself; however, it must do more than merely "rubber stamp" the specifications. Plaintiffs' first and third

factual allegations, involving the lateral center of gravity and crashworthiness, concern design aspects of the "product." Approval of design specifications that are reasonably precise means that the government exercise discretion over significant details and all critical design choices with regard to the "product." Therefore, in order to prevail on the first element of this special defense with regard to the alleged design requirements, UTC must prove that the Army approved reasonably precise specifications regarding the lateral center of gravity envelope for the "product" and regarding the crashworthiness design aspects of the "product."

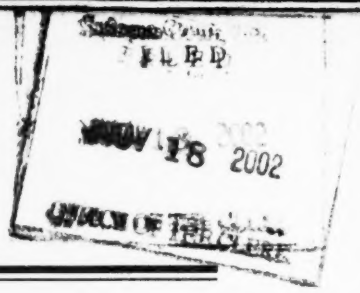
Plaintiffs' second factual allegation concerns product warnings, that is, warnings concerning controllability during foreseeable flight conditions. With regard to the first element of the government contractor defense, approval of specifications that are "reasonably precise" regarding warnings means that the government exercised control over significant details concerning the warnings UTC was required to and could provide about the "product."

Regarding the second element, that the "product" conformed to the specifications, with regard to plaintiffs' design defect allegations, UTC must prove that the lateral center of gravity limits of the "product" and its crashworthiness aspects conformed to the specifications. With regard to plaintiffs' failure to warn allegations, UTC must prove on this second element that the product warnings provided by UTC were required by the specifications as well as those warnings required of a seller (see pages 26 to 28) that were not, by the control or direction of the Army, prohibited. You may consider evidence in the case of documents which bear the signature of a government representative on the issue of compliance with government specifications, but it is not conclusive proof of such compliance.

With regard to the third element, UTC must prove it

disclosed to the Army, or warned the Army of, those hazards involved in the use of the "product" that were actually known by UTC, but were not known by the Army. Whether UTC should have known of a hazard is not an issue that you are allowed to consider in connection with this third element of the special defense. The only thing that matters is actual knowledge. Disclosures of hazards must be communicated in a reasonably effective manner. If, however, the Army knew of a hazard, then UTC did not have a duty to warn or disclose that hazard to the Army.

If you find that UTC has proven each of the three elements of the government contractor defense by a preponderance of the evidence as to a factual allegation that is a basis of the plaintiffs' legal theories, then you should find in favor of UTC on its government contractor defense as to that factual allegation.



No. 02-595

IN THE

Supreme Court of the United States

UNITED TECHNOLOGIES CORPORATION,

Petitioner,

v.

KATHLEEN DENSBERGER, Individually and as Executrix of the Estate of Colonel William Densberger, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUMMARY OF REASONS FOR DENYING THE PETITION

The Petition lacks merit because it hinges entirely upon a one-sided view of the factual record that was squarely rejected by the jury, district court and court of appeals below. Numerous misstatements of fact (and law) are made and key evidence is omitted. For those reasons, this Brief begins with a statement of relevant facts from the trial record.

The Petitioner was found negligent because it provided the Army with false piloting instructions that caused the subject helicopter crash. The Army had no involvement in preparing those instructions and relied on the Petitioner to provide correct safety information.

The district court and court of appeals faithfully applied the defense established by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). There is no conflict (as Petitioner suggests) but rather unanimous agreement among the circuit courts that the *Boyle* defense is inapplicable where: (1) the government had no opportunity for an informed exercise of its discretion; and (2) there is no significant conflict between the contractor's state law duty to warn and the federal contract. The three cases cited by Petitioner as the basis for a circuit conflict involve completely different factual circumstances where the government had actual knowledge of the dangers and made an informed decision regarding a product's warnings.

The jury was properly charged on the *Boyle* defense elements. The Petitioner did not object to that charge at trial pursuant to Fed. R. Civ. P. 51 and is barred from claiming error.

Neither the Second Circuit's opinion, nor the record below, raise the questions presented in the Petition. The "prescribe/proscribe rule" fabricated by Petitioner has never been followed by any court, including the court of appeals below.

Respondents therefore respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

STATEMENT OF RELEVANT FACTS FROM THE TRIAL RECORD

These wrongful death and personal injury actions arise from the 1993 crash of a U.S. Army UH-60A Blackhawk helicopter making a routine landing approach at the Weisbaden, Germany airport. A433, A436.[1] The plaintiffs are the pilot and a passenger who survived the crash and the widows of four deceased passengers. The defendant United Technologies Corp. ("UTC") designed and manufactured the helicopter with an external stores support system (ESSS) that held right and left external auxiliary fuel tanks. E104, E301. The accident helicopter was sold to the Army in 1988.

The accident investigation findings. The official Army investigation report concluded that at the time of the crash the aircraft's left ESSS fuel tank was empty while the right ESSS tank was nearly full and that the resulting lateral center-of-gravity ("CG") imbalance rendered the aircraft uncontrollable. E313 ¶6, E316 ¶17, E323, E359-60. As the pilots attempted to level out of a shallow right turn, the helicopter "did not respond to the pilot's attempt to control the aircraft," "could not be stopped from turning" and crashed. A434, A437, E313, E316, E323. The Army report

1. References herein to "A__" are to the Joint Appendix and "E__" to the Exhibits filed in the court of appeals.

concluded that the pilots acted properly and were not responsible for the crash. E315, E316, E320 ¶ 39, E321 ¶48.[2]

The Army Safety Center concluded that the crash was caused by "inadequate . . . notes, cautions, warnings and emergency procedures in the aircraft operator's manual. . . ." E662.

UTC's own accident investigator admitted that:

> *the pilots were blind sided* by multiple conditions that they were unaware of. . . . If it had not happened to them, it was bound to happen to someone else under the same aircraft loading and environmental conditions. The chain-of-events was circumstance.

E666 (emphasis added).

The Army and its pilots were "blind sided" because prior to the crash UTC repeatedly misled the Army by stating that the Blackhawk was "controllable," had "adequate flight control margins" and was "flyable" with one empty and one full ESSS fuel tank.

UTC's operator's manual. UTC prepared the original operator's manual for the ESSS equipped Blackhawk. UTC's

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2. UTC's claim that "the crash was caused by diminished control," Petition at 2, is contrary to the Army's determinations that the helicopter was uncontrollable and the testimony of both pilots. A434, A437, E316 ¶17, E359-60. Likewise, UTC's assertion that the helicopter "exceeded the prescribed flight envelope," Petition at 3, is wrong because UTC did not set lateral CG limits and told the Army that the helicopter could be safely operated with a lateral full ESSS fuel tank imbalance. E19, A411.

manual misinformed the Army that "*[t]he helicopter is controllable even if a single [ESSS] tank set is fully asymmetric (one empty/one full).*" E548 (emphasis added). UTC's manual established detailed longitudinal (fore-aft) CG requirements. No similar lateral CG requirements were provided. A433, A529.

Each year before the crash, UTC delivered new Blackhawk helicopters and was paid by the Army to revise and update the operator's manual, yet the manufacturer never corrected its false advice that the helicopter was "controllable" with unequal ESSS fuel loads. E668-69, A441, A505, A527, A533, A534.[3]

UTC's advice to the Army. UTC told the Army that:

> *The aircraft is flyable with a single full 230 gallon fuel tank . . . on one side of the ESSS*; however, stick margins are reduced. Abrupt maneuvers should be avoided and particular care should be taken during the final approach to the hover.

E299, E549 ¶4 (emphasis added). UTC's erroneous advice was incorporated into Army airworthiness releases (AWRs) in 1988, 1989 and 1990 and was never withdrawn by UTC prior to the crash.

UTC's contract. UTC's contract specifications for the ESSS equipped Blackhawk, the Critical Item Development

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3. UTC makes the misleading argument that the Army directed UTC "to *remove* from the manual a provision that [UTC] had drafted . . ." Petition at 6. But UTC ignores that this section was removed because the Army was acting in reliance on UTC's false information that the helicopter was "controllable." E548.

Specifications ("CIDS"), promised that the helicopter would have "*adequate flight control margins*." E19, A466. UTC admitted that this contract term meant that the aircraft must be controllable in foreseeable flight conditions. A465.

The terms of the Blackhawk contract required that UTC "shall conduct sufficient tests throughout the flight envelope to determine the aircraft controllability characteristics." E484. The Airworthiness Qualification Specification ("AQS") prepared by UTC required it "to prepare test plans, test reports and analytical substantiations." E53. The testing was supposed to include landing approaches "at low indicated airspeeds" with "[a] full range of gross weights and center of gravity locations. . . ." E484.

The contract also required UTC to "provide, implement and maintain a system safety program," and specifically, under the system safety integration process, to "identify all hazards associated with the potential mission applications of the ESSS. . . ." E282, E486-87, E662. These system safety obligations continued after the sale of the aircraft up until the time of the crash. E668-69.

In a 1991 revision to its specifications, UTC added a note that "[h]andling qualities and performance are degraded at extremes of lateral CG." E688. This note perpetuated UTC's false statements that the helicopter was "flyable" and "controllable" with one empty and one full ESSS tank. A527.

Army reliance on UTC. The Army relied on UTC's specifications, which promised that the Blackhawk/ESSS would have "adequate flight control margins" with unequal ESSS fuel loads. A498. The Army did not attempt to verify UTC's claims that the Blackhawk was "controllable" and

"flyable" with one full and one empty ESSS tank. A422-25, A505. Because of those representations, it was common knowledge among Army Blackhawk pilots that it was safe to fly with an ESSS fuel imbalance. A433, A435. Army Captain Sandman, who conducted a 1991 flight review of the Blackhawk, believed and relied on UTC's representations that the Blackhawk/ESSS was "flyable" with one full and one empty ESSS tank. A423, A428.[4]

UTC's post-crash warnings. After the subject crash, UTC abandoned its advice to the Army that the aircraft was "controllable" and "flyable" with one full and one empty ESSS tank and added new warnings to the operator's manual regarding flight operations with unequal ESSS fuel loads, including:

- Do not turn in the direction of the lateral imbalance . . .
- Use run-on landing techniques with touchdown speed in excess of 35 knots . . .
- Land as soon as practical. . . .

---

4. UTC makes the highly misleading claim that Captain Sandman warned about operations with unequal fuel loads. Petition at 23 n.7. The portion of the document cited by UTC involved a *completely different* "self-deployment" configuration of the helicopter with four ESSS tanks holding a total of 680 gallons on each side, *not* the subject "baseline" model with two 230 gallon tanks. E104, E132.

UTC also cites to an internal memo of a visiting RAF pilot, Andrew Tailby, to Captain Sandman. Petition at 23 n.7. The memo questioned the accuracy of UTC's advice that the aircraft was "flyable" with one full and one empty ESSS tank. E549-50. No proof was offered that Tailby's memorandum was sent to anyone other than Captain Sandman before the crash.

E411, A522-23. UTC never proposed these or similar warnings to the Army for inclusion in the operator's manual prior to the crash. E306, E401-02, A528-529.

UTC's trial evidence. UTC presented no evidence of analyses or tests that supported its erroneous advice that the Blackhawk was "controllable" and "flyable" with one full and one empty ESSS tank.

UTC contended that the pilots were negligent, relying on the expert testimony of a UTC flight test pilot who opined that the aircraft was controllable and special piloting techniques such as a straight run-on landing should have been used to avert the crash. A519, A528-29. Those techniques were known to UTC prior to the crash but not shared with the Army or its pilots until after the crash. A522-23, A529. UTC's expert disagreed with UTC's prior admission that the pilots were "blind sided." A525.

UTC relied on the testimony of Charles Crawford, the retired technical director of the Aviation Systems Command, known as AVSCOM, that the Army approved UTC's conduct of jettison tests proposed in UTC's original AQS. A489. Crawford acknowledged, however, that UTC subsequently promised in its CIDS that the ESSS equipped Blackhawk would have "adequate flight control margins," *i.e.*, that it would be controllable in all foreseeable flight conditions as specified by a "limited flight envelope." E84, E19, A492, A466. Significantly, on cross-examination, Crawford was confronted with his deposition testimony that he "did not know" if "there was ever a determination by [UTC] and the government of the limited flight envelope . . ."[5] A503. UTC's

5. Crawford's credibility was questioned not only because of his prior inconsistent statement but also his business dealings with UTC (Cont'd)

own Vice President was also unable to define the same flight envelope. A466, A470.

Contrary to UTC's claims, Crawford acknowledged that the Army set no restrictions on testing and UTC could have performed or proposed additional tests. A505. He also conceded that the Army relied on the accuracy of the information provided by UTC in making flight testing decisions. A498.

PRIOR PROCEEDINGS

The jury determined that the subject crash was caused by UTC's negligence, because it "failed to warn the Army that the 'product' could become uncontrollable during foreseeable flight conditions. . . ." A611. The jury made additional special verdict findings that plaintiffs failed to prove their other liability claims.

The negligence charge permitted the jury to consider UTC's entire conduct, both before and after the sale. A300-02. UTC incorrectly reads the verdict to mean that UTC "breached a *post-sale* duty to warn," and that UTC had "fully complied" with the Army specifications at the time of delivery. Petition at 7-8, 22.[6]

(Cont'd)
after retirement (including ten years as a paid consultant to UTC) and his personal friendship with several UTC employees. A500-501.

6. The defense verdict on strict liability did not time-limit the negligence verdict. The strict liability charge asked whether "at the time of sale" the "product" as delivered was defective. A292, 298. That "product" was expressly defined as a Blackhawk helicopter
(Cont'd)

The jury also found that UTC failed to prove its defenses to the negligence claim, including the pilot's comparative negligence and the government contractor defense. A614, A615-616.[7]

The district court entered a lengthy ruling denying UTC's post-trial motions. *Densberger v. United Technologies Corp.*, 125 F. Supp. 2d 585 (D. Conn. 2000).

A unanimous panel of the Second Circuit Court of Appeals affirmed the judgment. *Densberger v. United Technologies Corp.*, 297 F.3d 66 (2d Cir. 2002).

(Cont'd)
"with hard points capable of accepting an ESSS kit, and an ESSS kit" but "*without* fuel tanks." A291. The parties stipulated that UTC had not manufactured the fuel tanks, which were installed *after* the sale. A293. Unlike the strict liability charge, the negligence instruction did not restrict the jury to consider the helicopter "without fuel tanks" and "at the time of sale." A300-02, A291-92. The jury was entitled to find that the "product," *i.e.*, the helicopter at the time of sale *without* tanks installed, was not defective, while UTC negligently failed to warn of the dangers of using those tanks.

7. The jury entered awards for death and injury damages that ranged from $125,000 to $7,750,000 for the pilot, who suffered extensive burns. A618-620. UTC did not challenge the amount of these awards in its appeal.

REASONS FOR DENYING THE PETITION

I. SUBSTANTIAL EVIDENCE IGNORED BY THE PETITION SUPPORTED THE JURY'S VERDICT THAT UTC WAS NOT ENTITLED TO THE *BOYLE* DEFENSE

Boyle based its defense on the "discretionary function" exemption of the Federal Tort Claims Act and thus barred suits critical of product designs that "reflect a significant policy judgment by government officials. . . ." *Id.* at 513. *Boyle* protects the government's exercise of "judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Id.* at 511. *Boyle* established three necessary elements of the defense in a design defect case:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512. This Court explained that:

> The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated — *i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely the contractor itself.

Id.

A. The exercise of government discretion fundamental to the *Boyle* defense was not established.

There was no proof below that the Army made a "significant policy judgment," "trade-off" or other exercise of discretion because the Army relied to its detriment on UTC's false instructions that the Blackhawk was "controllable" and "flyable" under the exact flight conditions encountered when the accident airplane became uncontrollable and crashed.

Nor was there evidence that the Army made any substantive review or evaluation of UTC's false statements (and UTC did not come forward to explain how it justified making such statements). Indeed, UTC admitted that the Army was "blind sided." E666. UTC's claim that the Army had "complete control" over the manual warnings to pilots is bogus. Petition at 6.

The military contract did not empower UTC to issue false flight safety instructions. Moreover, by repeatedly giving misinformation and failing to correct its errors, UTC violated its specific ongoing responsibilities to provide a system safety program, identify all hazards associated with the ESSS, and update the operator's manuals. E282, E486-87, E662, E668-69, A463, A527, A534.

B. The *Boyle* requirement of a "significant conflict" between state law and the government contract is absent from this case.

The *Boyle* defense pre-empts only those state tort laws that are in "significant conflict" with the relevant government exercise of discretion. *Boyle*, 487 U.S. at 507-11. This Court

ruled that state law would generally not be pre-empted where "[t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care." *Id.* at 509.

The government contractor in *Boyle* was required to produce a helicopter escape hatch that opened outward, whereas state law imposed a duty to design the hatch to open inward. *Id.* In this situation, *Boyle* observed that "the state-imposed duty of care that is the asserted basis of the contractor's liability . . . is precisely contrary to the duty imposed by the government contract. . . ." *Id.* at 509.

Unlike *Boyle*, however, UTC's state law duty to warn the Army was entirely consistent with its government contract. The Army expected and relied upon UTC to provide accurate safety information, not instructions that the helicopter was controllable when the exact opposite was true. The *Boyle* defense did not apply because "the suit was not seeking to impose . . . a duty contrary to the duty imposed by the Government contract." *Id.* at 508.

Indeed, UTC's counsel admitted at trial below that "[t]here are no specifications about warnings," acknowledging that the contract did not conflict with state law. A562.

C. There was evidence that UTC, but not the Army, knew about the relevant danger.

The third element of the *Boyle* test is that "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 487 U.S. at 512. The Court found that absent such a requirement, "the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks." *Id.*

The jury was entitled to conclude that UTC had actual knowledge of the danger of loss of control while operating the Blackhawk with one full and one empty ESSS tank, while the Army remained unaware. First, UTC's test pilot testified that he had prior knowledge of special piloting procedures that could have been used to avoid the crash, but UTC did not share that knowledge with the Army until after the crash. A528-29, E411. Second, UTC participated in 1985 testing on an different Nighthawk model that demonstrated the control problems to UTC, but not to the Army. A377-78, E231, E233. Third, UTC added a note to the CG chart in 1991 that handling was "degraded at extremes of lateral CG." E688. UTC argued below that this note warned the Army "about the very danger that caused the accident." A629-30. The jury was entitled to conclude that UTC's note was insufficient to advise the Army of the danger (particularly since UTC failed to retract its false statements), and showed that UTC was aware of a control issue. Finally, UTC never came forward with the technical basis for its statements that the helicopter was "controllable" and "flyable" with one full and one empty ESSS tank. E299, E548. As a result, it was proper for the jury to determine that UTC knew at a minimum that those statements were unsupported and unreliable.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

UTC's Petition makes a vain attempt to manufacture a conflict among the opinions of various circuit courts. Those courts, however, have uniformly defined and applied the elements of the *Boyle* defense. The differences in the cited opinions hinge completely on the unique facts of each case, which UTC ignores. No doubt the circuit courts have used slightly different language to implement *Boyle*, but the substantive tests applied are the same and the results are consistent.

A. The court of appeals below faithfully applied *Boyle* in a manner consistent with other circuit courts.

The court of appeals below, relying upon its prior opinion in *Grispo v. Eagle-Picher Indus., Inc.*, 897 F.2d 626 (2d Cir. 1990), set forth a three part test for the *Boyle* defense in failure to warn cases:

> The three requirements of the *Boyle* test for failure-to-warn cases are: (1) "government control over the nature of product warnings"; (2) "compliance with the Government's directions"; and (3) "communication of all product dangers known to it but not to the Government." *Grispo*, 897 F.2d at 630 n.4.

Densberger, 297 F.3d at 74 n.11. Nearly identical failure to warn tests are set forth in other circuits, including the cases UTC cites. *Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 437 (5th Cir.), *cert. denied*, 531 U.S. 919 (2000); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th Cir. 1997); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1003-04 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995).

The courts of appeal have uniformly held that the *Boyle* defense preempts only state laws in "significant conflict" with the federal contract. *Densberger*, 297 F.3d at 74; *Tate I*, 55 F.3d at 1154 (Where "no federal interest 'significantly conflicts' with state law . . . displacement of state law is unwarranted."); *Kerstetter*, 210 F.3d at 438; *Oliver*, 96 F.3d at 1003; *Grispo*, 897 F.2d at 630.

There is also unanimous agreement among the circuits that the government's exercise of discretion must be substantive and meaningful, not a mere "rubber stamp." *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989); *Snell*, 107 F.3d at 748. Both *Tate* and *Oliver* found that "[w]hen the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion." *Tate I*, 55 F.3d at 1154, *quoting Trevino*, 865 F.2d at 1480; *Oliver*, 96 F.3d at 999 (same). *Tate* and *Kerstetter* concluded that the *Boyle* defense governed where "the government makes the informed decision not to include a specification or require a warning because, in the government's view, one would be unnecessary or problematic." *Tate v. Boeing Helicopters*, 140 F.3d 654, 660-61 (6th Cir. 1998) *(Tate II)*; *Kerstetter*, 210 F.3d at 438, *quoting Tate II.*

UTC relies heavily on a comment in *Tate* that "cases decided in other circuits applying the government contractor defense to failure to warn claims may require a higher level of government involvement than we think is required." *Tate I*, 55 F.3d at 1157. *Tate* referred in part to the language highlighted below from *Grispo*, which in turn was quoting *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598 (D. Conn. 1988):

> The contractor must show that whatever warnings accompanied a product resulted from the determination of a government official, *see Boyle*, [487 U.S. at 512] ("feature in question [must be] considered by a Government officer, and not merely by the contractor itself"), and thus *that*

> *the Government itself "dictated" the content of the warnings* meant to accompany the product. *See Nicholson*, 697 F.Supp. at 604. Put differently, under *Boyle*, for the military contractor defense to apply, government officials must remain the agents of decision.

897 F.2d at 630 (emphasis added). The court of appeals below cited the same language from *Grispo* in its opinion. Petition at 17a.

The term "dictated" was plainly used by the Second Circuit to refer to the *Boyle* requirement of an exercise of government discretion that raises a significant conflict with a state law duty. *Densberger*, 297 F.3d at 74-75; *Grispo*, 897 F.2d at 630; *Nicholson*, 697 F. Supp. at 604. In a similar manner, *Boyle* observed that "[t]he state-imposed duty of care . . . is *precisely contrary* to the duty imposed by the Government contract. . . ." 487 U.S. at 509 (emphasis added). Last year, this Court noted that the *Boyle* defense applied "[w]here the government has *directed* a contractor to do the very thing that is the subject of the claim. . . ." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (emphasis added).

Likewise, *Oliver* found that the defense applied where "this combination of specifications *prevented* [the contractor] from complying 'both with its contractual obligations and state-prescribed duty of care.'" *Oliver*, 96 F.3d at 999 (emphasis added), *citing Boyle*, 487 U.S. at 509. *Oliver* reviewed both *Tate* and *Grispo* (together with two Ninth Circuit decisions) and was not convinced that the cases applied different standards. 96 F.3d at 1004 n.8.

Indeed, contrary to its Petition, UTC argued to the court of appeals below that *Grispo* and *Nicholson* properly set forth the elements of the *Boyle* defense, quoting the precise language set forth above. UTC's Brief at 44-45. Likewise, at trial, defense counsel told the district court that "the *Nicholson* case . . . deals with the manual and I think it's right on point. . . ." A562.

UTC's complaint that the Second Circuit has shown "hostility" to the *Boyle* defense is hollow. Petition at 9. The Second Circuit was one of the first courts to extend *Boyle* to failure to warn claims. *Grispo*, 897 F.2d at 629-30. *Grispo*, which involved the Navy's purchase of commercially available asbestos-based cement, vacated the district court's entry of summary judgment and remanded for a determination whether there was "a genuine issue of material fact pertaining to the government's control over the product warnings. . . ." *Id.* at 627, 633. *Grispo* cited with approval the decision in *Nicholson*, 697 F. Supp. at 604, which held that the *Boyle* defense barred failure to warn claims involving a helicopter manual where the contractor (UTC) established substantive government control and discretion. *Grispo*, 897 F.2d at 629-30, 633. The Second Circuit also applied the *Boyle* defense to preempt a state law product claim where the Air Force approved a contractor's replacement part and accompanying maintenance manual for a jet fighter ejection system. *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83, 89 (2d Cir.) ("[I]t is not our role to second-guess the Air Force's judgment. . . ."), *cert. denied*, 509 U.S. 924 (1993).

Contrary to UTC's claims, the Ninth and Eleventh Circuits have not diverged from *Boyle* or their sister circuits. The Ninth Circuit in *Snell* held the *Boyle* defense applied where the contractor was "acting in compliance with

reasonably precise specifications imposed on it by the United States. . . ." 107 F.3d at 749. *Snell* denied summary judgment because, among other reasons, the contractor had not shown that the government "'approved reasonably precise specifications' constraining Bell's ability to comply with whatever duty to warn it may have had." *Id.* Quite simply, the court found that the contractor had failed in its motion to establish a "substantial conflict" between the contract and state law. *Boyle*, 487 U.S. at 509; *Oliver*, 96 F.3d at 999.

Similar to the facts in *Grispo*, in *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992), the Navy ordered commercially available off-the-shelf asbestos insulation that was "not manufactured with the special needs of the military in mind." *Id.* at 812. The Ninth Circuit found that there was no conflict between state law warning requirements and the Navy's purchase contract. 960 F.2d at 812. *Dorse v. Eagle-Picher Industries*, 898 F.2d 1487 (11th Cir. 1990), involved the same off-the-shelf asbestos insulation, and similarly concluded "that *no* conflict exists between the state tort duty and the federal contractual duty." *Id.* at 1489. *Grispo*, *In re Hawaii* and *Dorse*, are in complete accord with *Boyle*, which specifically recognized that purchases of "stock" items would not be governed by the defense, since the government had expressed no "significant interest" in the product's design. 487 U.S. at 509.

B. The cases cited by UTC are plainly distinguishable.

UTC's assertion of a circuit "conflict" is based on three cases that each granted summary judgment to a contractor because of unopposed proof that the government had prior warning of the relevant danger and a deliberate "trade-off" was made between military requirements and safety.

Moreover, the courts in two of those three cases did not even need to confront the *Boyle* defense because there was *no* state law duty to warn as a matter of law.

Tate considered defective design and failure to warn claims regarding a hook and sling system used to carry loads from a helicopter. The Sixth Circuit found that "the Army *was aware of all of the dangers* . . ." based on the contractor's "Hazard Analysis" that included "detailed information" of the specific risk; as a result, "no reasonable jury could have found that Boeing failed to warn the United States of the relevant danger." *Tate II*, 140 F.3d at 660 (emphasis added).

Similarly, in *Kerstetter*, which involved an allegedly defective pilot restraint system, the Fifth Circuit ruled that there was no duty to warn as a matter of law because it was an "*undisputed fact that the Navy knew about the problem* at least 10 years before the accident. . . ." *Id.* at 439 (emphasis added).

Oliver addressed the design of the fuel system of a Marine Corps truck. The court found that the requirements specified by the Marine Corps for the location and size of the fuel tanks constituted "the type of deliberate trade-off between military mission requirements and safety concerns that is at the heart of the government contractor defense . . ." and that the contractor "provided those warnings required by the government." *Id.* at 999, 1004.

UTC makes the baseless claim that "[t]his case is no different than *Tate*, *Oliver* and *Kerstetter*." Petition at 22. The contractors in those cases, however, established substantive government involvement, knowledge, decision-making and discretion regarding the relevant warnings as a

matter of law. The evidence below, found sufficient to support the verdict by both the district court and the court of appeals, *Densberger*, 297 F.3d at 75-76, demonstrated that UTC not only failed to meet its obligations to provide warnings, but also denied the Army any opportunity to make an informed exercise of discretion by repeatedly providing false flight safety information and failing to correct the error before the crash. Given these circumstances, the court of appeals properly questioned whether the *Boyle* defense should have been sent to the jury at all, because the case strictly involved "UTC's duty to warn *the Army* . . ." and there appeared to be no conflict between state and federal requirements. *Id.* at 75-76 n.13.

C. The "prescribe/proscribe" rule coined by UTC is a sham.

The Petition, in its questions presented and argument, is predicated on UTC's claim that the Second, Ninth and Eleventh Circuit Courts have applied a so-called "prescribe/ proscribe rule." Petition at (I), 18. This "rule," however, is one of UTC's own invention, and does not appear in the opinions of those three circuits (or any other court) regarding the *Boyle* defense. Nor is there any recognition by those circuits that they apply the *Boyle* defense in any manner different from other circuits.

UTC crafts its "rule" by carefully extracting the words "controlled," "constraining" and "prohibited" from various decisions, Petition at 13-14, and giving those words a spin that the courts never intended. Despite UTC's claims, the courts of appeals are in complete agreement that the defense does not require that the government "'prohibit' the contractor from proposing more alarming warnings. . . ."

Tate I, 55 F.3d at 1157. For instance, *Grispo* approved the test set forth in *Nicholson*, where "the court found sufficient, specific government control over the content of the warnings to satisfy the 'reasonably precise specifications' element of *Boyle*." *Grispo*, 897 F.2d at 633. *Nicholson* held that the "contractor is not under a duty to provide every known safety device where it is not called for by government contract." 697 F. Supp. at 603-04. No court has held to the contrary.

To support its argument, UTC speculates on various scenarios not raised by the evidence below. For instance, UTC suggests that these circuits will refuse to apply the *Boyle* defense unless the government itself drafts the relevant warnings. Petition at 13, 19. But the cases from the Second Circuit that actually addressed this issue applied the *Boyle* defense in cases where the government approved a contractor's warning or design. *Lewis*, 985 F.2d at 89; *Nicholson*, 697 F. Supp. at 603-04.

UTC makes the bald assertion that these circuits have attempted to resuscitate a formulation of the defense described in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988), that was rejected by this court in *Boyle*. 487 U.S. at 513; Petition at 18-19. The rejected test required that the government either: (1) design the product itself; or (2) make a conscious decision to proceed despite being advised by the contractor of the danger. 487 U.S. at 513. But there is no suggestion that any case has followed this test after *Boyle*. As discussed above, the courts of appeal have uniformly applied *Boyle's* three-prong test, including the critical requirement of active, informed government discretion. *Boyle*, 487 U.S. at 512 (The proper test must "assure that the . . . feature in question was considered by a Government officer.").

III. THE *BOYLE* DEFENSE CHARGE WAS PROPER; UTC DID NOT OBJECT TO THAT CHARGE AT TRIAL AND CANNOT ASSERT ERROR

The court of appeals found that the charge was "essentially correct" and did not constitute reversible error. Petition at 17a. The charge properly set forth the two fundamental conditions of the *Boyle* defense that the government actively exercised its discretion regarding the relevant warnings in a manner that raised a "significant conflict" with state law. The jury was told to consider whether "the government exercised control over significant details concerning the warnings . . ." and, if so, whether UTC provided "those warnings required of a seller . . . that were not, by the control or direction of the Army, prohibited." Petition at 53a. The charge correctly asked the jury to determine whether the Army's discretionary "control or direction" conflicted with UTC's state law duties.

The jury was also charged on the third *Boyle* element: whether UTC warned the Army of hazards "that were actually known by UTC, but were not known by the Army." The court cautioned the jury: "Whether UTC should have known of a hazard is not an issue that you are allowed to consider. . . . *The only thing that matters is actual knowledge*." Petition at 56a (emphasis added). UTC's repeated suggestions that the district court did not impose a requirement of actual knowledge are wrong. Petition at 10, 25, 26.

UTC *did not object* at trial to the charge language that it now seeks to challenge before this Court. UTC *never* advised the district court that it objected to the instructions regarding

the *Boyle* defense elements, including the use of the word "prohibited" to explain the government's exercise of discretion over warnings.[8]

Having failed to object at trial, UTC is precluded from making a claim that the charge was erroneous. Fed. R. Civ. P. 51 provides that a party may not "assign as error the giving or the failure to give an instruction unless that party objects thereto . . . stating distinctly the matter objected to and the grounds of the objection." UTC did not meet its obligation to make "specific," "distinct" and "clear" objections. *See Moore's Federal Practice 3d*, § 51.12[1][d], p. 51-37, and cases cited therein. Moreover, it is well established that the submission of a proposed instruction is not considered an objection to the instruction as given to the jury. *Id.* at § 51.12[1][e], p. 51-40.

Given the purported significance of the error claimed in the Petition, UTC's failure to object is indefensible. That failure was likely the result of UTC's shifting litigation strategies. At trial, UTC focused on its claim of pilot negligence. Before the court of appeals, UTC's primary claim was that Connecticut state law did not recognize a failure to warn action. In its Petition, grossly distorting the record and improperly rearguing the facts decided by the jury, UTC makes a last ditch attempt to avoid responsibility.

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8. UTC's Petition does not establish that UTC objected to the *Boyle* elements defined in the charge. Before the court of appeals below, UTC did present citations to the trial record, but UTC's only objection to the *Boyle* defense charge addressed the manner in which the plaintiffs' theories were set forth. A582.

IV. THIS CASE DOES NOT HAVE FAR RANGING POLICY IMPLICATIONS

The decision of the court of appeals will not, as UTC suggests, throw military contractors into turmoil. This case addresses a unique situation involving a contractor that gave the military false flight safety instructions. We are aware of no other case addressing the *Boyle* defense that involves similar facts.

While UTC complains that failure to warn claims will "side-step" *Boyle* and render its defense "a practical nullity," Petition at 3, 12, similar arguments were rejected by the circuit courts in *Tate* and *Oliver*, which both cited the Second Circuit's holding in *Grispo* with approval. *Tate I*, 55 F.3d at 1156-57; *Oliver*, 96 F.3d at 1003. Responding to the claim of the *Grispo* contractor that a failure to warn action was an "end run" around *Boyle*, the court stated:

> We disagree. As the *Boyle* Court pointedly explained, "[C]onflict there must be." [*Boyle*, 487 U.S. at 508]. To us, a plaintiff's ability to pursue a failure to warn claim when *Boyle* may foreclose a design defect claim is not indicative of some loophole inadvertently left open by *Boyle*, but rather demonstrates a crucial lack of the necessary conflict between state and federal warning requirements.

897 F.2d at 631.

UTC repeatedly raises the danger of design defect claims "packaged" as failure to warn claims, Petition at 12, 28. But this case was clearly grounded on UTC's false statements and failures to warn, not the helicopter's design.

At the end of the day, UTC seeks absolute contractor immunity absent the exercise of government discretion, akin to the *Feres* doctrine explicitly rejected by *Boyle*. 487 U.S. at 510. This is demonstrated by UTC's argument that compliance with the third *Boyle* requirement for a warning based on the contractor's actual knowledge automatically preempts all state law duties to warn. Petition at 24. There is no question that the *Boyle* defense preempts state law, but only after *all three* of its elements — including the fundamental requirement of an exercise of government discretion in "significant conflict" with the state law duty — are established. In sum, UTC wants to convert the heart of the *Boyle* defense into a rubber stamp to validate its misconduct.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 02-595

IN THE

Supreme Court Of The United States

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

KATHLEEN DENSBERGER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF COL. WM. DENSBERGER, *et al.*,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Many of the Chamber's members provide goods and services to the United States under military and civilian government contracts. The Chamber regularly advocates its members' views in the Supreme Court and other appellate forums. It initiates and enters litigation involving issues of national concern to the American business community.

We write as an *amicus curiae* to address the interests of the government contracting community, many of whose members are members of the Chamber. Our interest in critical government contracting issues has led to *amicus* presentations to this Court in numerous government contractor product liability cases, including *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

The decision of the United States Court of Appeals for the Second Circuit in the instant case has serious adverse implications for Chamber members doing business with the government. The troublesome conflict among the circuits as to the scope of the government contractor defense is set forth by Petitioner and will not be repeated. Rather, this brief

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[1] Petitioner and Respondents have consented to the filing of this brief, and their letters of consent are filed herewith. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

addresses how the Second Circuit's misreading of the government contractor defense erodes the boundary of protection for discretionary government decisions to deploy, use and update military systems.

The Second Circuit failed to give any weight to the unique environment in which defense contracting takes place. It compounded this failure by ignoring an important line of cases showing that long-term use of a military product constitutes acceptance of that product (including design weaknesses) as a protected, discretionary government act. The result is a decision that has negative consequences for government contractors and the nation's defense efforts.

The decision below is of great concern to the Chamber in that it undermines the carefully articulated baseline of protection for federal interests embodied in the government contractor defense. Without clarification by this Court, those interests will be eroded, and civilian and military contractors assisting in implementing government decisions may face unpredictable liability merely because a claimant files suit before a court that has erected obstacles to the full protections set forth in *Boyle*.

SUMMARY OF ARGUMENT

This case involves the fatal crash of a Blackhawk military helicopter which occurred after the Army decided to "fit" it with supplemental fuel tanks. The key issue in this case is whether the government's decision to deploy this mature weapon system with a new fuel supply, but without first performing supplemental testing to create a new "flight envelope," can create commercial liability on the part of the contractor when an accident occurs.

In addressing this issue, the court below gave no weight to the unique, government-controlled environment in which

weapons procurement occurs, and thus misconstrued the philosophical and logical bases of the government contractor defense. In the procurement environment, the government exercises its plenary authority to make unilateral, uniquely governmental decisions regarding the design, purchase, deployment and "use environment" of weapons systems. Unlike consumer products, these systems are designed to be lethal and operate in hostile combat environments, and the notion of "safety" is a highly relative one to be balanced by the government against other considerations such as combat efficacy, maneuverability, weight, range, "hardness" under attack, and cost. This balancing of considerations is a quintessentially government function.

The court below then compounded its error by failing to recognize the strong body of authority illustrating that post-sale, long-term use of government-ordered systems constitutes *de facto* approval of the system's design. Where, as here, the government has knowledge of a product's inherent characteristics, including limitations and potential safety issues, but continues to accept and use the product, choosing not to change the design, that decision is a discretionary act for which neither the government nor the contractor can be held liable.

The decision below has created a situation in which the legal and financial consequences of governmental decisions can come to rest on private parties that have no unilateral authority or discretion. Where the government has complete control over the deployment, testing and use environment of a weapon, as well as an extremely sophisticated customer, private contractor liability undermines the contractor defense, with negative effects on military and civilian government contracting, defense planning, and the nation's developing homeland security effort.

REASONS FOR GRANTING THE PETITION

I. GOVERNMENT CONTRACTING TAKES PLACE IN A UNIQUE ENVIRONMENT IN WHICH THE CONTRACTOR HAS NO UNILATERAL DISCRETION TO ALTER GOVERNMENT DECISIONS REGARDING DESIGN, TESTING AND DEPLOYMENT

The Second Circuit exacerbated an important inter-circuit conflict by failing to recognize the unique federal nature of the environment in which the Blackhawk helicopter and other major weapon systems are conceived, designed, built, refit and operated. A review of this environment and the legal and practical realities surrounding it illustrates that decisions to design, build and deploy weapons are discretionary government decisions made in furtherance of the national defense, not commercial decisions made by a military contractor.

In the military procurement environment, government control over weapons design is plenary. The government chooses its products in a process informed by strict, mandatory government standards and specifications, and competing discretionary goals, be they strategic, defensive, financial or even political. The government evaluates systems with a sophisticated design and testing operation of its own.

Tradeoffs between safety, efficacy and other factors are the very essence of military procurement, and similar tradeoffs apply to civilian products purchased by the government as well. Deployment of the best military helicopters will involve tradeoffs of stability versus maneuverability, size versus speed, payload versus range. Troop carriers are designed to address many considerations, including size, speed, mileage, hill-climbing ability, cost and many other

factors. The light tank may exchange armor for weight, and sacrifice size and even survivability under some conditions in order to fit into existing cargo planes. Each of these decisions, as well as the decision to deploy a weapon in particular environments, potentially placing service personnel in harm's way, involves many considerations, of which safety is only one factor.

At a very basic level, the military imposes its will on contractors through requiring contractors to build government products subject to detailed military specifications (MILSPECS), and military standards (MILSTDS), all under the authority of the Federal Acquisition Regulation (FAR), the Defense FAR Supplement (DFARS), and even subsidiary acquisition regulations promulgated by the individual military services. On a higher level, the government decides, based on military and political considerations, which weapons and materiel to purchase and deploy. Unlike a commercial entity, the government can decide to produce (and order a contractor to produce) products with no commercial application, such as depleted uranium bullets, insulation containing asbestos, or even a potentially dangerous herbicide with no product information or warnings. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 194, 199, 201 (2d Cir. 1987) (decision not to warn servicemen of potential risks of Agent Orange is a discretionary government decision). The Blackhawk, which was designed entirely for military applications and has no civilian counterpart, falls neatly into the category of a purely military product.

The law of government contracting clearly recognizes the government's primacy over the design and deployment of weapons systems, even when the contractor is a participant in the planning and design process. A good historical example is *Hickman Sea Sled Company,* ASBCA No. 3008, 57-1 BCA ¶ 1177. In *Hickman*, the Armed Services Board

of Contract Appeals (ASBCA) found that the government was responsible for specifications concerning the propellers of the subject sea sled. Although the contractor wrote the proposed propeller specifications, the government's adoption of them meant that "the Government approved the specifications and that Appellant was bound to follow the specifications in producing a prototype Sea Sled." *Id.* at p. 3213. The Board also found that the contract "bound Appellant in any event to follow the specifications in reaching the end results of the contract to the extent that there were any specification provisions covering a given subject." *Id.*

A similar situation arose in *E. L. Cournand & Co., Inc.*, ASBCA No. 2955, 60-2 BCA ¶ 2840. In that case, the government's design specifications (which were reached in coordination with the contractor and adopted by the government) were impossible to fulfill. The ASBCA found that the contractor could not be forced to bear that risk, quoting "the settled principle of law that in the absence of exceptional circumstances, a contractor has the right to rely on the Government's specifications and can be charged with no responsibility for their inadequacy." *Id.* at p. 14,759.

This theme is an enduring one in government contracting. As the ASBCA has flatly stated: "When the Government contracts for supplies to be manufactured in accordance with Government specifications, ordinarily there is implied warranty on the part of the Government that, if the specifications are followed, a satisfactory product will result." *Appeal of Szemco, Inc.*, ASBCA No. 9892, 1964 ASBCA Lexis 1008, at *28.

This logic is not limited to administrative contracting boards. Indeed, for nearly a century, this Court has approved the logic of the government bearing responsibility for the duties and burdens it imposes on contractors. In *United*

States v. Spearin, 248 U.S. 132 (1918), the Court considered the plight of the government contractor building a Navy dry dock. The contractor was required to (and did) follow detailed government specifications for the relocation of a sewer. *Id.* at 134. The entire project flooded, causing extensive damage. *Id.*

In considering the contractor's claims, Justice Brandeis cited a rule with application here: "[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications . . . the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate." *Id.* at 136, 137.

The modern-day application of these rules clearly illustrates the scope of the government's discretion in determining what weapons or products to deploy, and in deciding how to deal with safety and "use environment" issues. *See Fairchild Republic Co. v. United States,* 712 F. Supp. 711 (S. D. Ill. 1988) (military's decision to allow asbestos dust to remain in work area, and to require worker to use asbestos tape, was a discretionary government decision under FTCA); *Maas v. United States*, 94 F.3d 291, 297 (7th Cir. 1996) (soldiers exposed to radiation during recovery of a nuclear weapon); *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 996-98 (9th Cir. 1987) (radiation exposure during tests of nuclear weapons); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 194, 201 (2d Cir. 1987) (exposure of servicemen to potentially dangerous herbicide, without warnings or labeling).

This history clarifies the scope of the Court's recognition in *Boyle* that government contractors should be protected

from third-party tort claims in certain "uniquely federal" situations. 487 U.S. at 505. The Court analogized the position of a government contractor facing third-party tort claims to the civil liability of federal officers for actions taken in the course of their official duties, and determined that in both situations "there is obviously implicated the same interest in getting the Government's work done." *Id.*

In explaining the federal interest in shielding government contractors from liability, the Court quoted and extended its holding in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940). In *Yearsley*, which involved a commercial performance contract for dredging services, the Court found that a government contractor has no liability in tort for damages caused by a dredging operation when the contractor followed government direction, stating broadly that "there is no liability on the part of the contractor for executing [the government's] will," 309 U.S. at 21. In *Boyle*, the Court extended this logic to procurement contractors, finding that "[t]he federal interest justifying this holding [in a third-party tort action] surely exists as much in procurement contracts as in performance contracts." *Boyle*, 487 U.S. at 506.

Notwithstanding that *Boyle* was an action between two private parties, the Court found that the displacement of state tort law was justified by the government's interest in procurement: "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be

directly affected." *Id.*[2] The Court concluded: "we think that the character of the jet engines the Government orders for its fighter jets cannot be regulated by state court law, no more in suits by civilians than in suits by members of the Armed Services." *Boyle*, 487 U.S. at 511.

This statement from *Boyle* has particular resonance in the case of government-ordered, post-sale modification of mature weapons systems. Such governmental decisions can perhaps be evaluated under military, strategic, or political standards. However, their "uniquely federal" nature makes second-guessing under state tort law impossible. Connecticut tort law can no more provide a rational evaluation of the Army's decisions on fuel tanks than it can judge whether the military should have deployed the Blackhawk in Europe at all, or should have decided to extend the Blackhawk's range and lift capabilities. Indeed, "the application to military weapons producers of ordinary state law tort liability rules would discourage those manufacturers from providing necessary assistance in the product design and development process, would undermine military discipline by authorizing the second-guessing of weapons design and procurement decisions, and would increase the manufacturer's uncertainty as to potential liability, thus increasing the costs to the United States." *Supplemental Memorandum of the United States as Amicus Curiae* at 4,

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[2] Extending its holding regarding liability even beyond the rules set forth in *Feres v. United States*, 340 U.S. 135 (1950), the Court clarified that the government interests at stake were of such consequence that the government contractor defense would apply not only to service-related injuries, but to civilian injuries claimed to be caused by military systems. *Boyle*, 487 U.S. at 506.

filed in *Boyle v. United Technologies Corp.*, No. 86-492 (U.S. 1987).

The Court's broad mandate in *Boyle* simply cannot be reconciled with the views of the Second Circuit, which "very much doubt[ed] that the government contractor defense is relevant," in a case involving a military helicopter transporting military personnel on official government business at an American military base overseas, *United Technologies Corp. v. Densberger*, 297 F.3d 66, 75, *petition for cert. filed* __ U.S.L.W. __ (U.S., Oct. 18, 2002) (No. 02-575), but rather implied that Connecticut had a greater interest than the federal government in the outcome of military actions on foreign soil.

Nor can the Court's broad mandate in *Boyle* be squared with the Second Circuit's view that the government contractor defense "would seem to make sense only when the government, for reasons of federal interest, chooses to limit the warnings provided by the seller *to end-users,*" i.e., require the government to order United Technologies not to do something both parties already have stipulated it had no duty to do. *Id.* That is a misreading of *Boyle*, for the government decisions which resulted in the alleged inability of the Blackhawk to retain stability in flight in every possible situation were discretionary government decisions made in the context of a government procurement contract. Under government contract law, under *Spearin*, and under *Boyle*, no contractor liability should result.

The current procurement environment involves not only military and civilian products manufactured for the government, but also products and services developed to assist in the government's homeland security effort. Many of these products involve "cutting-edge" technology, and have no civilian counterparts. They can be deployed in potentially dangerous situations, in situations in which the

government chooses to project lethal force, or in homeland security situations (such as interdicting terrorist attacks) in which failure can have almost unimaginable consequences. If contractors are not protected from liability arising from these governmental decisions, many contractors will choose not to assist in the government's work, and those that remain will charge the government higher prices, thus indirectly placing liability back on the government.

II. POST-SALE, LONG-TERM USE OF GOVERNMENT-ORDERED EQUIPMENT IMPLIES DE FACTO, DISCRETIONARY GOVERNMENT APPROVAL OF THE EQUIPMENT DESIGN

A second reason why this case should be heard is that the Second Circuit, in rejecting the better-reasoned cases finding the exercise of government discretion through government involvement in warnings, also ignored the line of cases, controlling here, in which the government's long-term use and acceptance of equipment constituted *de facto* approval of the equipment design, including its warnings. That concept has particular relevance here, as the Blackhawk helicopter is a "mature" weapon system well-known, and best-known, to the government through decades of use, and the government, not the contractor, is in the best position to determine the potential effects – both good and bad – of equipment modification.[3]

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[3] It also bears noting that the Blackhawk, like many sophisticated weapons systems, is a "compound system." It is not merely an air taxi; it is also an offensive weapon with passive and active protection devices, sophisticated communications, and myriad electronic devices focused on "C4ISR" (command, control, communications, computerization, intelligence, surveillance and reconnaissance) that were the work of many other contractors, and the government.

The leading case in this area is *Ramey v. Martin-Baker Aircraft Co. Ltd.*, 874 F.2d 946 (4th Cir. 1989). In *Ramey*, the court applied the government contractor defense to dismiss a negligence action against a aircraft ejection seat contractor, Martin-Baker, when a maintenance worker was injured by accidental operation of the seat. The court found that the seat conformed to Navy specifications, and that the Navy was aware of its potential hazards:

> [T]here is no doubt that the seat is potentially dangerous to maintenance personnel. . . . We conclude, however, that the Navy was well aware of the seat's harmful propensities before Ramey's mishap.
>
> We have observed that the Navy had F-18s in fleet service prior to the time of Ramey's accident. The record of message traffic among Navy officers and agencies reveals full knowledge of the danger implicit in prevailing maintenance protocols. While we regret that this recognition did not benefit Ramey, we find no issue that Martin-Baker could have apprised the Navy of any material circumstances not already known to it. Considering as we do that the evidence does not leave the applicability of the military contractor defense at issue, we agree with the district court that the defense insulates Martin-Baker from liability for Ramey's injuries.

Id. at 951 (footnote omitted).

A similar situation, and a similar result, occurred in *Harduvel v. General Dynamics Corporation*, 878 F.2d 1311 (11th Cir. 1989), which arose out of the fatal crash of an F-16 "Fighting Falcon" aircraft near Kunsan Air Base in South Korea. The pilot's family and estate claimed the crash was the result of electrical failure due to "chafing" of electrical wires inside the plane. *Id.* at 1314.

In applying *Boyle*, the Eleventh Circuit addressed whether the claimed defect in the airplane – wire chafing – was a design issue or a manufacturing defect. If "a defect is one inherent in the product or system that the government has approved, it will be covered by the defense," whereas a mere claim of shoddy workmanship implicated no federal interest. *Id.* at 1317.

The *Harduvel* court found that the design of the F-16 "was a result of 'continuous back and forth' between the Air Force and General Dynamics," and that this cooperative process not only met the standard for reasonably precise government specifications, but also implied that these design standards (including a well-known propensity for wire chafing) were met. *Id.* at 1320-21. The 11th Circuit found that because "the Air Force knew of wire chafing . . . well before Harduvel's crash," and was "plainly aware of the chafing problem in the F-16 generally" but in spite of this knowledge continued to fly the hundreds of F-16s in operation and purchase new ones, the government contractor defense applied. *Id.* at 1321-22.

The Sixth Circuit recently considered this issue in *Landgraf v. McDonnell Douglas Helicopter Co.*, 993 F.2d 558 (6th Cir. 1993). There, the court explained how the government, by relaxing a military contract standard for helicopter rotor blade clearance but continuing to accept helicopters, created a situation of government approval of reasonably precise specifications.

The court found that the history of the development of the OH-6A helicopter, including "several years of planning, the delivery of prototype aircraft and testing by both the FAA and the Army," and "progressive[] and continuous[]" Army

inspections throughout production indicated that the Army had made a discretionary decision to relax this contractual requirement. *Id.* at 562.[4] "By permitting production to continue without any change in design following the 1969 tests, the Army made a discretionary decision not to insist on the [rotor] clearance recommended in [the contractual military standard]." *Id.* at 564.

At the base of these cases is the idea that the government, in choosing weapon systems, has the discretion to choose the systems that will best accomplish the government's military goals, and is in the best position to know of weaknesses or potential safety issues. In deploying these weapons, the government may in the exercise of its discretion choose to act or not act regarding known potential safety issues. Either way, the government's decision (and the actions of the contractor doing the government's work) should not be subject to attack under state tort law.

In the instant case, this authority should have great weight. As the record shows, the Blackhawk helicopter had been in military service for many years, and its characteristics were well-known to the government. A government decision to make a change in the potential mission of the helicopter (i.e., to add payload, extend range and augment missile-carrying capacity), without conducting tests regarding the new flight envelope is clearly a discretionary government decision, and should not be subjected to analysis or second-guessing under state tort law, even if the government made the decision not to test without considering all of the alternative avenues of action. "[A] product conforms to

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[4] The record also indicated that, just as in the instant case, helicopter manufacturer Hughes "recommended additional testing" for the tail rotor. *Id.* at 563.

reasonably precise specifications if it satisfies 'an intended configuration' even if it 'may produce unintended and unwanted results.'" *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir. 1989), *quoting Harduvel,* 878 F.2d at 1317.

These cases merely underscore the scope of the government's discretion in choosing military hardware. As this Court said in *United States v. Varig Airlines,* 467 U.S. 797, 808 (1984) the "discretionary function exception" of the Federal Tort Claims Act "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." The scope of that discretion is essentially unfettered, provided that the challenged act involves an element of judgment, and is based on public policy considerations. *Baldassaro v. United States*, 64 F.3d 206, 208, 210-11 (5th Cir. 1995). What is at issue is the nature of the conduct, not the nature of the actor. *Id.*

In other words, the test of a discretionary act "is not whether the government actually considered each possible alternative in the universe of options, but whether the conduct was of the type associated with the exercise of official discretion." *Smith v. Johns Manville Corp.*, 795 F.2d 301, 308-09 (3rd Cir. 1986) (emphasis added). *See Andrade v. United States*, 116 F. Supp. 2d 778, 788 (W.D. Tex. 2000) (discretionary function exception includes "the failure to consider possible alternatives").

The protection afforded by federal courts to discretionary government acts in the military operations context is simply incompatible with the prescribe/proscribe standard set forth by the Second Circuit below. Indeed, were this Court to adopt the prescribe/proscribe standard, it would displace the military's discretionary decisions regarding warnings, and

replace it with a judicially-created mandate that the government must "seriously consider" and issue orders regarding warnings. That standard, wholly inconsistent with *Boyle*, would substitute the judgment of courts for that of military decisionmakers, and ultimately and ineluctably draw the courts into making value judgments about the kinds and quality of the government's decision making regarding weapons systems. As the Court concluded in *Boyle*:

> The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects.

Boyle, 487 U.S. at 513.

The decision below oversteps the protective boundaries of *Boyle* by creating "back door" liability for discretionary government decisions that could not be challenged directly. It increases the costs of government contractors and impedes the government's work – whether it be delivering mail, providing for the national defense or protecting homeland security – by creating barriers to defense procurement, since only contractors willing and able to work in a situation of uncertain, almost unlimited liability will contract with the government.

CONCLUSION

The decision below misconstrues the government contractor defense in a manner that has serious, negative implications not only for contractors, but for military discipline, defense readiness and national security overall. It not only permits but encourages second guessing of

government defense and national security decisions, creating civil torts out of decisions made by military and government officers.

This Court's guidance on these issues in *Boyle* has been undermined and confused by intervening decisions by the circuits which have created doubt as to the appropriate scope of the government contractor defense. The Second Circuit's grudging interpretation of *Boyle* below adds to this confusion by deepening the conflict with the better-reasoned rules of several circuits and the reasoning of *Boyle* itself. The Court should grant the petition for a writ of certiorari, and uphold and clarify its guidance in Boyle that discretionary decisions by the government will not result in liability to the government or those who carry out the government's will.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

KATHLEEN DENSBERGER, Individually and as Executrix of
The Estate of Colonel William Densberger, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS

The Aerospace Industries Association of America, Inc. ("AIA") is the national, non-profit trade association representing manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA's members include many of the nation's largest corporations providing military equipment to the federal government pursuant to government contracts similar to the contract involved in this case. AIA is concerned that the decision of the court below, which addresses the application of the government-contractor defense to allegations of failure to warn, will have serious adverse effects upon the contractual relationship between the federal government and the companies with whom it contracts for military equipment.[1]

SUMMARY OF ARGUMENT

The application of this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), to failure-to-warn claims requires clarification if the federal government is to receive the full benefit of contractors' expertise in the development of unique military equipment for our armed forces. Absent clarification, government contractors must assume that the government-contractor defense will be ineffective in many jurisdictions so long as the plaintiff artfully pleads a failure-to-warn claim, even though the defense would prevail against a claim of design defect in the same case.

The absence of predictable and reliable criteria for the application of the defense forces contractors to assume the

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[1] Petitioner United Technologies Corporation and Respondents Kathleen Densberger, *et al.*, consent to the filing of AIA's brief *amicus curiae*. Copies of their respective written consents accompany this brief, which was written in its entirety by the undersigned counsel for AIA and funded by AIA and its members.

worst. Contractors will be increasingly hesitant to commit to the long-term cooperative relationship that typifies the development of advanced-technology military equipment and systems and that is essential to the government's objective of acquiring equipment that will satisfy extreme mission requirements while operating as safely as practicable. Uncertainty about the viability of the defense against failure-to-warn claims, combined with restrictions on contractors' ability to discover latent dangers as a result of discretionary government decisions, inevitably increases contract costs. It also dilutes the value of the contractor's expertise because the prospect of failure-to-warn claims pressures contractors to expand, with an eye toward litigation, the information and options they place before the contracting officer. This promotes defensive warning and overwarning at the expense of effective warning.

The conflict among the lower courts arises out of the diverse multitude of warnings, instructions, directions and other forms of communication that accompany government contracts for military equipment, as well as the variety of state-law causes of action and doctrines that have evolved under the rubric of "failure to warn." In some jurisdictions, courts have treated warnings that accompany military products, such as flight manuals, as attributes of the product's design and have applied *Boyle's* familiar three-part test to claims that user warnings were inadequate. But other courts, in cases involving military and non-military products, have rewritten *Boyle* in failure-to-warn cases, imposing such unrealistic requirements that the defense will be impossible to establish.

Further confusion arises when, as in this case, the duty to warn runs to the government rather than to the ultimate user and the plaintiff includes a claim of negligent failure to warn in the complaint. While these claims sound in negligence rather than strict liability, they implicate the contractor's relationship

with the military just as directly as does a claim of design defect. The court below, after questioning whether *Boyle* applies at all to these claims, articulated a test that ignores *Boyle's* rationale and reinserts state-law standards into the contractor and government relationship. Whether and to what extent *Boyle* displaces state law when the plaintiff alleges a negligent failure to warn the government are issues that will likely arise in many if not most cases. The opinion of the court below, along with other equally cryptic opinions, amply demonstrates the need for clarification.

The improper application of *Boyle* to various types of failure-to-warn claims, whether the warnings run to end users, to the government, or to the government for the benefit of end users, has led to the proposition that contractors cannot establish the government-contractor defense against failure-to-warn allegations unless they somehow prove that the government contractually precluded them from obtaining and providing certain safety-related information to the government. This unworkable test may betray a misconception of how safety information is generated by the contractor and the government and shared between them, or it may reflect a basic disagreement with the policy behind *Boyle*. Whatever its origin, it permits the government-contractor defense to prevail against a classic design-defect claim, yet to fail against a failure-to-warn claim on exactly the same facts. In other words, the label the plaintiff places on the evidence, not the evidence itself, will determine liability.

Contractors need to know the limits of their responsibility for discovering safety-related information in connection with their performance under military procurement contracts. As against a design-defect claim, *Boyle* is clear that the contractor must meet an actual-knowledge standard and will not be liable for the failure to discover latent defects in what is ultimately the government's design. If contractors must meet a more

stringent state-law standard whenever the plaintiff recasts the allegations as a failure to warn, which can occur in virtually any case, then the defense offers no meaningful protection. The practical effect of misapplying *Boyle* to warning claims is to nullify *Boyle* in all cases, because the liability is the same whether the claim is design defect or failure to warn. *Boyle* obviously did not intend this consequence.

ARGUMENT

EFFECTIVE CONTRACTOR PARTICIPATION IN THE PROCUREMENT PROCESS REQUIRES A REALISTIC GOVERNMENT-CONTRACTOR DEFENSE AGAINST FAILURE-TO-WARN ALLEGATIONS

Failure-to-warn allegations against military contractors typically attack the warnings that accompany a product, or that the plaintiff alleges should have accompanied the product, such as the warnings and instructions in a flight manual. Depending on the jurisdiction, these allegations of inadequate user warnings may be part of the design-defect claim or they may be stated separately under negligence or warranty theories.[2] The lower courts are split on how to apply *Boyle* to these failure-to-warn claims. Some circuits, correctly in AIA's view, hold that *Boyle* applies to user-warning cases in the same way that it applies to product-design cases.[3] Other circuits hold that

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[2] For example, as noted by the court below, the Connecticut Product Liability Act "discusses the duty to warn in terms of product defect, that is, in terms of strict liability and liability for violation of implied warranties." *Densberger v. United Technologies Corp.*, 297 F.3d. 66, 71 (2nd Cir. 2002) (citation omitted).

[3] *See, e.g., Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431 (5th Cir.), *cert. denied*, 531 U.S. 919 (2000); *Tate v. Boeing Helicopters*, 140 F.3d 654, 658-61 (6th Cir. 1998); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1004, n.8 (7th Cir. 1996).

applying *Boyle* to user-warnings issues requires the contractor to establish that the government proscribed the warnings that the plaintiff alleges were necessary or prescribed the warnings that the plaintiff alleges were flawed, placing a burden on the contractor in warning cases that is not present in pure design cases.[4]

The split in the circuits regarding *Boyle's* application to warnings that accompany government-ordered products needs resolution. If user warnings accompanying military equipment are to be treated differently than the equipment itself for purposes of the government-contractor defense, government contractors will have to account for the difference as they decide whether to undertake the preparation of flight manuals and similar materials, how to factor the increased risk into their proposals, and how best to position themselves for future litigation.

Failure-to-warn allegations can also center on information that the contractor allegedly failed to provide to the government itself. These allegations may reflect state-law concepts such as the learned intermediary doctrine,[5] the sophisticated user defense,[6] or the continuing duty to warn after the initial sale of the product,[7] but their essence rests on basic negligence principles and they can be alleged as an additional

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[4] *See, e.g., Grispo v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 632 (2nd Cir. 1990) (asbestos); *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489-90 (11th Cir. 1990) (asbestos); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997)(military helicopter).

[5] *Densberger*, 297 F.3d at 75 ("All parties to the present action . . . have agreed that [Sikorsky] had no duty whatsoever to warn the ultimate product users, *i.e.*, the pilots.")

[6] *Emory v. McDonnell Douglas*, 148 F.3d 347 (4th Cir. 1998)(military contractor not responsible for warning the individual military personnel who fly planes under military command).

[7] *Densberger*, 297 F.3d at 71 ("Because the CPLA does not expressly prohibit post-sale liability for negligent failure to warn, the negligence-based common law duty survives and is cognizable under the statute.")

count in virtually any product liability case. The gravamen of the plaintiff's allegation is that, if the contractor had provided the information to the government that a reasonable manufacturer would have provided, then the plaintiff would not have suffered this injury.

The court below suggests that the government-contractor defense may be irrelevant against these "failure-to-warn-the-government" claims and that, even if relevant, the defense would require the contractor to show "that the Government controlled or limited the ability of contractors . . . themselves to warn those who come into contact with its product." *Densberger*, 297 F.3d at 76, *quoting Grispo*, 897 F.2d at 630. Against a claim of failure to warn the government, this test apparently means that the contractor must show that the government prevented the contractor from warning the government, an almost surreal proposition that contractors will not be able to establish.

The Ninth Circuit, in *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997), has expressed a similarly unworkable view in addressing the claim that the contractor failed to warn *the government* after delivery of the product, stating, "The issue here is whether Bell's obligations under its contract with the government were in conflict with its performance of whatever duty state law might have imposed on it." Again, apparently, the contractor must somehow prove that the contract prevented it from providing information to the government.

Whether the failure-to-warn claim focuses on the contractor's role in developing user warnings for a flight manual or more generally on the contractor's failure to warn the government, judicial opinions that impose additional conditions upon the government-contractor defense in failure-to-warn cases upset the careful balance that *Boyle* strikes between requiring the exercise of government discretion in

safety decisions while not deterring valuable contractor participation in those decisions. If the defense requires a showing that the government dictated all warnings, was presented with all warning options, and actually prevented the contractor from presenting additional options and information, then the defense will have no true viability in the real world of government procurement.

EQUIPMENT WARNINGS EVOLVE IN THE SAME WAY AS EQUIPMENT DESIGNS

Government contracts for the development of sophisticated military equipment typically include in the scope of work the task of developing a host of user warnings and instructions, including product labels, maintenance and repair instructions, training materials, flight manuals, and other literature. These materials are not intended primarily to communicate dangers to government contract personnel for the purpose of selecting a design, but rather to communicate with those who actually use (or repair and maintain) the equipment on how to do so more safely or effectively. User warnings accompany the product, are finalized only after the product design is finalized, and are, in every sense, part of the product.[8]

The same contractor-government interaction that characterizes the development of hardware designs for sophisticated government equipment describes the process for developing the user warnings that will accompany that

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[8] These user communications are not coextensive with the safety information that a government contractor provides to the government in the course of selecting and developing a design for a product. Whereas the government contractor's communications to the government *identify* potential problems, communications to the user *address* those problems, separately or in conjunction with other steps, such as redesigning the equipment, placing restrictions on its use, or providing special training.

hardware. As in this case, the contractor will typically develop a draft flight manual, analogous to a hardware prototype, and then engage the government in extensive back-and-forth discussions about needed revisions until a final manual is selected. The final version of the flight manual (or maintenance manual or product labeling) is tied directly to the ultimate design of the equipment, because a change in the hardware likely necessitates a change in the information provided to the user.

The degree of government involvement in the selection of the final user warnings and instructions can range from the government initiating the drafts, to the government reviewing and approving the contractor's proposals in varying levels of detail, to the government merely rubber-stamping the contractor's proposals. In short, the range of government involvement in developing, approving and ultimately selecting user warnings directly parallels the government role in developing, approving and selecting the equipment's hardware design. *See, e.g., Tate v. Boeing Helicopters*, 55 F.3d 1150, 1154-55 (6th Cir. 1995) (Army initially developed and actively participated in the design process for helicopter tandem hooks) (*Tate I*); *Tate v. Boeing Helicopters*, 140 F.3d 654, 658-61 (6th Cir. 1998) (Army actively involved in development of operators' manual) (*Tate II*); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 998-99 (7th Cir. 1996)(Marine Corps actively involved in design process and provided reasonably precise specifications for warnings); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1486 (5th Cir. 1989) (Navy rubber-stamped contractor's design); *Emory v. McDonald Douglas*, (4th Cir. 1998) (contractor prepared initial drafts of manuals but Navy worked closely with contractor and retained control over manuals' text).

Requiring the contractor to establish that the government specifically rejected a particular user warning or mandated one

and only one warning method, as opposed to establishing that the government approved "reasonably precise specifications" for warnings, departs from the rationale of *Boyle*. *Boyle* does not require that the government prepared the design specifications, that the government dictated one and only one design, that the government specifically rejected the alternative design urged by the plaintiff in litigation, or that the specifications addressed the specific design defect alleged by the plaintiff. *See, e.g. Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 437 (5th Cir. 2000); *Trevino*, 865 F.2d at 1480; *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 799 (5th Cir. 1993). Plaintiffs can always point to additional or alternative warnings not considered by the government, claiming that state law required those warnings and that the federal government did not prohibit them (having not considered them). *Boyle* rejects this approach for defective-design claims as it was set forth by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), because it would "penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." 487 U.S. at 513.[9]

If government contractors are foreclosed from establishing the government-contractor defense unless they prove that the government specifically rejected every alternative warning that the plaintiff can think to offer, the defense will not likely prevail. The resulting problem--deterring contractors from participating in the warning process--is perhaps even more acute than that presented in *Boyle*.

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[9] The *Shaw* test for the military-contractor defense in cases where the contractor participated more than minimally in the design process required the contractor to show "that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design." 778 F.2d at 746.

While the limits of known technology constrain the design alternatives that a plaintiff can offer to second-guess military designs in a design-defect case, warning theory is far less precise and far more subjective.

Whether a danger or condition is sufficiently open and obvious so as to remove the need for a warning, whether a warning should be verbal, pictorial, audible or a combination, what color, size and shape a warning should have, where it should be placed, what its exact content should be, whether its inclusion would dilute or detract from other warnings, and innumerable specific considerations as to the wisdom and feasibility of a given product warning involve at least as much art as science and allow for endless opinions. Determining which hazards to warn against, which warning methods to use, and which warning messages to impart in order to address any given hazard present almost countless options. To require the contractor to prove that it presented the government with whatever warning the plaintiff offers at trial in order to establish the defense is simply to deny the defense, given that the plaintiff will advocate a warning approach that it knows the contractor did *not* offer for the government's consideration.

Requiring the manufacturer to defend against the plaintiff's second-guessing may be an acceptable consequence of state law in purely private tort cases, *Boyle*, 487 U.S. at 513, but it does not protect the government's interest in effective contractor participation in the warnings process when the federal government procures specialized military products. If the government contractor feels constrained to present the government with every conceivable alternative in attempting to protect itself against failure-to-warn liability, then the government will lose the benefit of the contractor's true expertise, which consists of offering the government its best judgment, not every possible option.

FAILURE-TO-WARN ALLEGATIONS UNDER STATE LAW MUST BE RECONCILED WITH *BOYLE'S* THIRD PRONG

The third prong of *Boyle's* three-prong test requires the contractor to show only that it warned the government about dangers in the use of the equipment that were *known to the contractor* but not to the government. As the courts have consistently held, the third element of the defense is established in design-defect cases even if the contractor failed to disclose information that the plaintiff alleged it *should have* known. *See, e.g., Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 436 (5th Cir. 2000)("The government contractor defense does not require a contractor to warn the government of defects about which it only should have known."); *Trevino v. General Dynamics*, 865 F.2d 1474, 1487 (5th Cir. 1989)("After *Boyle*, a government contractor is only responsible for warning the government of dangers about which it has actual knowledge.")

But state-law failure-to-warn claims focus not only on what the contractor knew, but also on what the contractor should have known. Therefore, when courts that apply *Boyle* to failure-to-warn claims require the contractor to establish that the requirements of the contract limited their ability to comply with state-law warning requirements, the effect is to rewrite the third prong of *Boyle*. Because government contract terms obviously do not forbid contractors from acquiring safety related information and sharing that information with the government, the result is that the defense is unavailable against a state-law claim that the contractor *should have known* about a problem with the equipment it provided to the government.

Although the facts presented to this Court in *Boyle* required the Court to define the government-contractor defense only in design-defect cases, there is a broader need to define the manufacturer's obligations to discover latent dangers in

military designs, apart from whatever theory of recovery the plaintiff may advance. This case amply illustrates the confusion. The district court instructed the jury on the failure-to-warn claim that state law imposed a should-have-known standard, that the third prong of *Boyle* imposed an actual-knowledge standard, and that the *second* prong of *Boyle* required the contractor to show that the Army did not prohibit Sikorsky from meeting the state-imposed standards. Sikorsky Petition at App.C., p. 55a.[9] A juror, assuming the ability to sort through this maze, would ultimately have to conclude that *Boyle's* second prong negated *Boyle's* third prong. It is difficult to imagine that this is the correct application of the government-contractor defense in failure-to-warn cases.

Preserving the actual-knowledge standard set forth in *Boyle's* third prong is of pivotal importance to contractors and to the government. When contractors are required to share their actual knowledge with the government, exercising the requisite level of diligence in their communications with government-contract personnel will suffice to establish the defense and avoid liability. On the other hand, holding manufacturers to a "should have known" standard pursuant to a failure-to-warn allegation effectively nullifies *Boyle* because prevailing on a design-defect claim while losing on a failure-to-warn claim, on the very same factual allegations, renders the success of the government-contractor defense on the design-defect claim meaningless. Moreover, it provides a real-world incentive for contractors to propose extensive test and evaluation programs to explore potential risks that may be remote, creating a direct conflict between state law and the government's interest in an efficient, cost-effective procurement process.

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[9] Consistent with the practice in Petitioner's brief, AIA refers to Petitioner as "Sikorsky" throughout the remainder of this brief.

The issue of what a manufacturer of complex, unique and inherently dangerous military equipment *should have* discovered about the risks of the equipment is fraught with endless conjecture. Applying the typical state-law test of what a reasonably prudent manufacturer would do under "like circumstances"[10] is an inappropriate standard when the unique attributes of the product, the customer, and the user mean that other manufacturers are simply not in "like circumstances."[11] Developing and marketing a consumer product in the attempt to meet or create market demand has very little in common with obtaining and performing a government contract to develop an advanced weapons system for the military, where "the United States is required by the exigencies of our defense effort to push technology toward its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods." *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449-50 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

What a manufacturer knows or can reasonably discover about the equipment it develops for the government flows from the exercise of government discretion regarding the time and resources allowed for the development process, the scope of testing, decisions about control of the equipment after delivery to the government, and information imparted from the

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[10] The district court instructed the jury, in pertinent part, as follows: "Reasonable care is that degree of care which a reasonably prudent manufacturer would use under like circumstances . . .. You must determine the question by placing an ordinarily prudent person in the situation of [Sikorsky] and then ask yourselves, what would such a person have done?" Sikorsky Pet. at App. C., p. 53a.

[11] The extreme danger in which the equipment is necessarily used exacerbates the problem. The district court further instructed the jury as follows: "In circumstances of slight danger a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of great danger a correspondingly great amount of care would be required to constitute reasonable care." Sikorsky Pet. at App. C., p. 53a.

government to the contractor. Because state law does not account for the pervasive federal-government role in determining the nature and quantity of information that will be generated about state-of-the-art military equipment, this Court should reconcile *Boyle's* third element with state-law duties to warn.

IGNORING *BOYLE'S* BALANCE BETWEEN GOVERNMENT DISCRETION AND CONTRACTOR PARTICIPATION IN WARNING CASES CREATES A CONFLICT BETWEEN STATE LAWS AND THE FEDERAL INTEREST

In explaining that it is "hard to see why [the government-contractor defense] should apply to limit the warnings that a reasonable seller should provide to the government itself," *Densberger*, 297 F.3d at 75, the court below stated that *Boyle* requires a conflict between state and federal requirements before the government-contractor defense can apply and that "[i]t is quite plausible to say, however, that where the duty in question is a duty to warn only the government, there is no such conflict and hence that a defendant will not be able to pass the first prong of the *Boyle* test." *Id.*, n.13. These statements by the court below mischaracterize the *Boyle* rationale and ignore the reality of government contracting for military equipment.

If the government-contractor defense required a "conflict" in the sense suggested by the court below, then *Boyle* itself would never have become law. The *Boyle* defense applies where a design is found defective under state law, even though there is no "conflict" between a state's interest in compensating those injured by defective products and the government's interest in procuring non-defective products. *Boyle's* first prong permits the exercise of contractor discretion in proposing designs to the government, including the possible negligent

exercise of that discretion,[12] even though there is no "conflict" between the states' and the federal government's interest in avoiding negligently designed proposals. And *Boyle's* third prong does not hold contractors to a state-law "should-have-known" standard even though there is no "conflict" between the state's interest in holding manufacturers to that stricter standard and the federal interest in receiving as much information as possible about the products that the federal government procures. It is not these sorts of conflicts, but the more general conflict that arises when the *government's decisions* expose the *government's contractors* to liability under state law, that *Boyle* resolves.

In imposing the prerequisite of a "conflict" upon the availability of the government-contractor defense in the guise of implementing *Boyle*, the court below actually rejected *Boyle's* rationale. *Boyle* itself establishes, through its three-pronged test, "the scope of displacement" of state law necessary to resolve a conflict. One may argue whether *Boyle's* test displaces state law to an extent beyond that necessary to avoid a federal-state conflict—one may even argue that the test laid out in *Shaw* strikes a more appropriate balance—but that is an argument over the *correctness* of *Boyle*, not an argument over its application.

Boyle protects the discretionary function of the federal government, but it does so in a way that does not deter "active contractor participation in the design process," *Boyle*, 487 U.S. at 513. The opinion of the court below, and the other opinions that condition the defense on the contractor proving that the government actually prevented the contractor from proposing alternatives or providing information, badly distort that balance in failure-to-warn cases and deter contractor participation in

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[12] *Boyle* did not adopt the *Shaw* requirement that "the contractor did not participate, or participated only minimally, in the design of the defective equipment." *Boyle*, 487 U.S. at 513.

both the design and the warning aspects of developing military equipment.

Because government contracts will not *forbid* contractors from proposing particular warnings, uncovering latent defects, or sharing information, conditioning the availability of the defense on such an unrealistic showing is to deny the defense. But this is not to say that the failure to consider an alternative or to discover a new danger is divorced from the exercise of the government's discretion. The government contract controls the scope of the development effort through the contract terms, the time allowed for contract performance, specification of the test program, control of access to the equipment after delivery, and control of information flowing from the government back to the contractor. Because of this degree of control, including control of how the equipment will be used, whether a latent danger will be discovered is more a product of the government's discretion than of the contractor's.

None of these constraints affects the manufacturers of consumer products, who have complete control, subject only to market forces, over the resources to devote to product development, the time for introducing the product, and the nature and quantity of testing required to ensure safety, both pre- and post-sale. When a consumer product suffers from a latent defect or presents a latent danger warranting an additional user warning or other remedial measure, it is appropriate to ask whether a reasonable manufacturer would have discovered the defect or danger because the manufacturer typically controls the means to do so, be it through warranty, accident reports, post-sale testing, further development of the brand or model, or other activities arising out of its continuing relationship with a mass-produced product. But where the government decides what highly specialized equipment it needs for uniquely governmental tasks and then controls how the equipment will be developed, evaluated and used, the

government necessarily controls the means of discovering latent dangers in that equipment.[13]

Boyle's adoption of "reasonably precise specifications" and the actual-knowledge standard as tests for a contractor's obligation to provide the government with information and options concerning military equipment reflects a realistic understanding of the important but limited role the contractor plays when the government procures and employs specialized equipment to fill unique government needs. Lacking appreciation for the pervasive government influence over how military equipment will be designed, tested and used, the court below adopted an artificial test for failure-to-warn claims, a test that erroneously assumes that the contractor, not the government, controls the process.

THE PLAINTIFF'S CHARACTERIZATION OF THE CAUSE OF ACTION SHOULD NOT BE OUTCOME DETERMINATIVE

The court below, after questioning whether *Boyle* could apply to allegations that the government contractor failed to provide information to the government, held that, if *Boyle* did apply, the test laid out in *Grispo v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 632 (2nd Cir. 1990), would control. *Densberger*,

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[13] Government decisions not to conduct additional testing and evaluation are unquestionably discretionary government decisions. *See, e.g., Estate of Bernaldes v. United States*, 81 F.3d 428 (4th Cir. 1996)(discretionary function exemption of Federal Tort Claims Act applies to federal mine inspectors' alleged negligence in failing to discover safety violations); *Meyers v. United States*, 17 F.3d 890 (6th Cir. 1994) (inspectors had discretion to choose among alternative courses of action for inspecting and monitoring coal mines); *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968 (10th Cir. 1994) (Army decision not to conduct more complete investigation of aircraft crash site shielded by discretionary function exemption).

297 F.3d at 75-76. The court quoted *Grispo's* holding that, under *Boyle's* first prong, showing that the warnings met "reasonably precise specifications" meant that the contractor must show "the Government itself 'dictated' the content of the warnings meant to accompany the product" and that "the Government controlled or limited the ability of contractors . . . themselves to warn those who would come into contact with its product." *Densberger*, 297 F.3d at 76, *quoting Grispo*, 897 F.2d at 630, 632 (emphasis added).

This unworkable approach portends a problem that will plague any failure-to-warn allegation in a product liability case involving specialized military equipment until the Court clarifies *Boyle's* application to such cases. Whenever the plaintiff alleges that the defendant government contractor failed to provide some information to the government that was unknown to the government or to the contractor, but that the contractor should have known, the plaintiff may allege that the contractor's failure to discover and disclose the information resulted in a design defect. But the plaintiff can also allege in any such case that the failure to discover and disclose the information constituted a negligent failure to warn under state law.

In both cases, the government contractor may be able to establish that the government approved reasonably precise specifications, that it manufactured the product according to the specifications, and that it disclosed to the government all dangers of which it was aware and of which the government was not aware. In both cases, the contractor's and the government's actions and involvement may be identical. On the allegation of design defect, the contractor will be able to establish the government-contractor defense, with the actual-knowledge standard of its third element, and will avoid liability under Boyle. But on the failure-to-warn allegation, the contractor will be liable because the contractor cannot establish

that the government prevented the contractor from providing the allegedly missing information to the government.

When the availability of the government contractor defense depends not on the facts, but only on how the plaintiff characterizes the cause of action, government contractors cannot conform their behavior so as to preserve the defense and must assume that they will be unable to establish it--*i.e.*, unable to prove that the government prevented the contractor from sharing information. Accordingly, *Boyle's* purpose of protecting the government's interest in military procurement through a carefully tailored three-element government-contractor defense will be frustrated.

Other courts have recognized that the proper application of *Boyle* requires looking beyond the labels. In *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), the plaintiff sought to avoid the pre-*Boyle* government-contractor defense applicable to allegations of design defect by including a claim of negligent design. In reversing the district court's opinion that the defense was unavailable when the contractor was alleged to have established negligent specifications, the 4th Circuit stated:

> The policies discussed earlier apply forcefully in either a negligence or strict liability context. Courts are ill equipped to make military judgments, whatever a plaintiff's theory of recovery. . . . The danger that contractors will participate less and charge more stems from the threat of liability for government-approved technology, not from the particular theory of recovery.

Id. at 408-09. *See also*, *Kerstetter*, 210 F.3d at 436, n.6 (noting with approval district court's holding that negligent inspection claim, to the extent it was based on design defect, "is displaced

by the applicability of the government contractor defense to the design defect claim").

Every design-defect or negligent-design case can be recast as a failure-to-warn case because the plaintiff can simply allege that the defect or faulty design should have been discovered and disclosed, to the ultimate user and/or the government. The government-contractor defense, which protects the government's interest in selecting equipment for the military services, should not turn on this procedural distinction.

CONCLUSION

For the foregoing reasons, AIA respectfully submits that the Petition for a Writ of Certiorari should be granted.

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November 18, 2002

(6)

No. 02-595

DEC 2 CLERK

In the Supreme Court of the United States

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

KATHLEEN DENSBERGER, Individually and as Executrix of the Estate of Colonel William Densberger, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

Despite the arguments plaintiffs advance in their brief in opposition, the issues presented in the petition are properly framed and warrant immediate review.

I. THE QUESTIONS ARE PROPERLY PRESENTED.

Plaintiffs attempt to characterize the case as fact-dependent, contending that there "was evidence" from which the jury "could have found" that Sikorsky did not meet the elements of the government contractor defense as properly understood. Opp. 10-13. But the question here is whether the case was submitted under an improper view of the law – *i.e.*, whether it was error to instruct that Sikorsky was entitled to the defense only if it proved that the government had "prohibited" the warnings that the jury found to be required under state law — a charge that effectively directed a verdict against Sikorsky on the issue. If that charge was erroneous, Sikorsky was deprived of proper consideration of its defense and is entitled to have the case redetermined under a correct view of the law.

The instruction at issue would be reversible error under the Fifth, Sixth and Seventh Circuits' view of the government contractor defense. Plaintiffs do not, and could not, claim that they could have received judgment as a matter of law under the rule prevailing in those Circuits, and in fact Sikorsky offered ample evidence to present a jury question under their interpretation of the defense. Pet. 21-24. Accordingly, the circuit conflict is squarely presented, and any factual disputes are irrelevant to the legal question before this Court.[1]

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[1] Plaintiffs' factual assertions also are misdirected. Their key contention is that Sikorsky "misinformed the Army" by stating that the Blackhawk was "*flyable*" with one full tank and one empty tank. Opp. 4-7. That statement, however, as the jury found when it returned verdicts favorable to Sikorsky on eight of plaintiffs' nine theories, accurately reported the results of the *jettison* testing commissioned by the Army (A471), when the anticipated mission for

Plaintiffs also assert that Sikorsky did not adequately preserve its objections to the faulty jury instructions. First of all, plaintiffs are mistaken. A558. In any case, their quibble is irrelevant here. Sikorsky raised the instructional error before the court of appeals, and the plaintiffs did not claim that it was waived. See Br. for Appellees at 59-60. The court of appeals decided the issue on the merits. Accordingly, the issue is properly before this Court. See, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U.S. 98, 122 n.1 (2001) (Scalia, J., concurring) (by deciding issue on the merits, Court of Appeals indicated that it was preserved); *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 445-46 (1993).

II. THE SCOPE OF THE GOVERNMENT CONTRACTOR DEFENSE IS IMPORTANT TO THE GOVERNMENT AND TO ALL SUPPLIERS OF MILITARY EQUIPMENT.

Plaintiffs also assert that "this case does not have far ranging policy implications" and that it is not important to define the scope of the government contractor defense in failure-to-warn cases. Opp. 24-25. The filing of *amicus curiae* briefs by several industry groups urging the Court to take this case belies that assertion.

Moreover, in *Boyle* the Solicitor General explained why it is important to have a meaningful government contractor defense as a matter of federal common law, displacing any inconsistent state-law theories of liability. The "availability of the military contractor defense as a matter of federal common law" rests on the principle that the "relationship between the government and its suppliers of ordnance" is "distinctively

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the ESSS did not contemplate *landing* an unbalanced aircraft. That issue arose only after Sikorsky completed the Army-authorized testing, when the Army subsequently decided to use ESSS-equipped Blackhawks to ferry passengers on short hops.

federal in character." Br. for United States as Amicus Curiae, No. 86-492 at 11 ("U.S. *Boyle* Amicus"). In a Supplemental Memorandum, the Solicitor General explained why a federal defense for military contractors must displace state tort law:

> [T]he application to military weapons producers of ordinary state law tort liability rules would discourage those manufacturers from providing necessary assistance in the product design and development process, would undermine military discipline by authorizing the second-guessing of weapons design and procurement decisions, and would increase the manufacturers' uncertainty as to potential liability, thus increasing the costs to the United States as well.

U.S. *Boyle* Amicus Supp. Mem. at 3.

The Solicitor General declared that nothing short of the national defense is involved and added: "Indeed, a more striking conflict between a critically important federal interest and the consequences of otherwise applicable state law cannot be found among the decisions of this Court invoking uniform federal common law rules." *Id.* at 5. He explained that the "procurement process for weapons systems and associated specifically military products proceeds by a long-term cooperative interaction of employees of the military and its contractors * * * ." U.S. *Boyle* Amicus at 6. Therefore, "[w]hether this military contractor defense is available, and what a contractor must prove to establish it, will affect the process by which the military procures weapons systems and the safety and effectiveness of that equipment." *Id.* at 1.

It is more vital than ever that the Court resolve promptly the disarray among the circuits about "what a contractor must prove to establish" the government contractor defense in failure-to-warn cases. The Homeland Security Act of 2002, which was signed into law on November 25, 2002, expressly

provides that "[s]hould a product liability or other lawsuit be filed for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies * * * have been deployed in defense against such act * * * there shall be a rebuttable presumption that the government contractor defense applies in such lawsuit." H.R. 5005, 107th Cong. § 753(d) (2002) (enacted). Congress, however, did not address the elements of the government contractor defense, leaving with this Court the responsibility to continue the development of this doctrine of federal common law. This adds to the need for clear and authoritative guidance, which only this Court can provide, regarding the contours of the defense and the scope of protection contractors can expect as they work with the government to develop products for national security.

III. THE PRESCRIBE/PROSCRIBE RULE POSES A CIRCUIT CONFLICT, ARTIFICIALLY DISTORTS THE PROCUREMENT PROCESS, AND UNDERMINES *BOYLE*.

1. Plaintiffs seek to refute what the circuits themselves acknowledge – that there is a material conflict in their views of the scope of the defense See, *e.g.*, *Oliver* v. *Oshkosh Truck Corp.*, 96 F.3d 992, 1004 n.8 (7th Cir. 1996); *Tate* v. *Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995) (*Tate I*). For example, in *Tate I* the Sixth Circuit, citing the Second Circuit's *Grispo* decision (on which the court below relied), explicitly refused to follow the requirements imposed by "[s]everal of the cases decided in our sister circuits" that the contractor "must show 'that the Government itself dictated the content of the warnings'" or "imposed a 'prohibition'" against the allegedly required warnings. 55 F.3d at 1157 (citations omitted).

Plaintiffs nevertheless assert that the cases are reconcilable on the ground that in *Tate*, *Oliver* and *Kerstetter* the contractors showed "substantive government involvement, knowledge,

decisionmaking and discretion regarding *the relevant warnings* as a matter of law." Opp. 19 (emphasis added). In fact, those decisions specifically ***rejected*** a requirement that the contractor demonstrate that the government focused on the "relevant warnings." Thus, as *Tate II* explained: "A requirement that government review focus on a particular hazard or warning at issue * * * would significantly increase the government contractor's evidentiary burden and would go beyond the requirements of the *Boyle* test." 140 F.3d 654, 658-61 (6th Cir. 1998). See also *Oliver*, 96 F.3d at 1004. Thus, despite plaintiffs' assertions, those circuits do not confine the defense to situations in which the government exercised "discretion" to address the *specific* warning later called into question.

By contrast, in limiting the defense to situations in which the government itself "prescribed" allegedly defective warnings or "proscribed" the suggestion of additional warnings, the Second Circuit and the other circuits that have aligned with it have failed to recognize what the Solicitor General explained in *Boyle* about the military procurement process. Procurement of important weapons systems such as the Blackhawk involves a cooperative and iterative process. The "relationship between the military and its contractors" in the "development of weapons systems" is "complex"; the government sets some requirements "at the outset in detail," while others are "left for formulation during the design process." U.S. *Boyle* Amicus at 9. Because the "development of military products is almost always a joint effort," it is often "difficult to single out either the government or the contractor as the party responsible" for a particular decision. *Id.* at n.7.

In light of the way the procurement process evolves, the Solicitor General in *Boyle* urged the Court to reject the Eleventh Circuit's *Shaw* formulation, as the Court did. Contrary to plaintiffs' assertion (Opp. 21) that the decision below bears no resemblance to *Shaw*, the *Shaw* rule would have

made a defense available only when the contractor merely did what the military directed and refrained from doing anything prohibited. The Solicitor General recommended, by contrast, that the defense be available so long as the government ultimately had exercised discretion about that subject matter. This Court agreed. 487 U.S. 500, 513 (1988).

Using the same analysis, the Fifth, Sixth and Seventh Circuits have held that, in a failure-to-warn case, the defense applies so long as the government exercised discretion with respect to the *subject* of appropriate warnings, even if the government did not "prescribe" all permissible warnings and did not "proscribe" the contractor from suggesting other potential warnings. Those circuits have it right.

2. The Court should take this case in order to reject the effort by the Second Circuit and like-minded courts, in failure-to-warn cases, to engraft additional restrictions onto the test formulated in *Boyle*. Simply because the concern here is safe use rather than safe design is no reason to interpret the *Boyle* test in a way that places additional requirements on the contractor and (as the Fifth, Sixth and Seventh Circuits have found) sharply narrows the scope of the defense. In each situation, the issue under the first *Boyle* prong is the same: Did the government exercise discretion with respect to the subject matter at issue? In *Boyle*, it was the "selection of the appropriate design for military helicopters to be used by our Armed Forces," which was "assuredly a discretionary function" and thus satisfied the first prong of the defense. 487 U.S. at 511. As three circuits have held (Pet. 14-17), the apt parallel when an injured serviceman complains about the sufficiency of warnings is whether the government exercised discretion in deciding what warnings are "appropriate" for its personnel.

The second prong also is the same in both contexts: Did the manufacturer comply with the government's directives on the

matter at issue — here, did the contractor provide whatever warnings the government ultimately decided were appropriate? So, too, the third prong, which is concerned with the extent to which the exercise of government discretion was an informed one, should be the same: Did the contractor *actually* know of latent hazards not known to the government and yet fail to alert the government to the risks?

In addition to the other practical imperatives justifying a meaningful defense for federal contractors, the Solicitor General in *Boyle* explained how disruptive it would be to the military departments if the defense turned on identifying whether the contractor or the military procurement officers were responsible for making the decision on the alleged hazard. Litigation over allocating such culpability between the contractor and the military would have "deleterious consequences * * * on military discipline." U.S. *Boyle* Amicus at 15. That kind of inquiry inevitably would produce finger-pointing and require searching cross-examination of military personnel in order to determine who specifically decided that the allegedly defective warning was adequate.

IV. BOYLE DISPLACES ANY STATE TORT RULE IMPOSING LIABILITY ON DEFENSE CONTRACTORS FOR FAILING TO WARN ABOUT POTENTIAL HAZARDS OF WHICH THEY MERELY "SHOULD HAVE KNOWN."

Plaintiffs contend that *Boyle*'s "requirement of a 'significant conflict' between state law and *the government contract* is absent from this case." Opp. 11-12 (emphasis added). That misstates *Boyle*, which held that there must be a significant conflict between state law and federal *policy*. 487 U.S. at 512. Here, that conflict manifests itself in two respects. First, the government was integrally involved in the process of testing and developing warnings about the Blackhawk/ESSS. Pet. 4-7, 21-23. Imposition of state tort liability on Sikorsky

for failing to conduct additional testing so that it could identify additional risks conflicts with the federal policy reflected in the Army's cost-benefit calculus that balanced safety against mission needs, development time, and costs. See *Tate II*, 140 F.3d at 658.

A second, broader conflict between state law and federal policy is also apparent. The courts below permitted liability to be based upon a negligence theory: that Sikorsky failed to warn about hazards that it *should have perceived*, risks of which a *reasonable manufacturer* would have been aware. Pet. App. 10a. That basis for imposing liability conflicts with the federal policy, articulated in *Boyle* itself, that military contractors should have no liability for failing to warn of risks about which they "should have known," but did not actually know.

The *Shaw* formulation rejected by this Court in *Boyle* would have denied the defense to any contractor who had failed to "warn the military about potential hazards of the design, including hazards *reasonably* known to manufacturers of analogous civilian products." U.S. *Boyle* Amicus at 7 (emphasis added). The Solicitor General explained that the kind of "reasonably should have known" standard often applied under state product liability law to manufacturers of civilian products is not "practical" or desirable in the military procurement setting. *Ibid.* A contractor should lose protection only if it fails to "warn the military about dangers *actually known* to it but not known to the military." U.S. *Boyle* Amicus at 19 (emphasis added). The Court adopted this "actual knowledge" test. See *Boyle*, 487 U.S. at 513. What the Solicitor General said in *Boyle* applies with equal force today:

> [B]y evaluating the conduct of military contractors under a standard of care applicable to manufacturers of consumer products, the *Shaw* version provides an incentive to perform testing and safety evaluation that

> will interfere with the military's interest in obtaining weapons systems quickly and efficiently. * * * [B]y requiring detailed warnings by contractors – and explicit acknowledgments by the military – on almost every conceivable matter, the *Shaw* version is likely to produce a voluminous paper record that will cause delay and perhaps result in the obfuscation of real safety hazards.

U.S. *Boyle* Amicus at 7. This case, in which Sikorsky has been held liable for failing to press the Army to conduct additional testing, illustrates the pertinence of these observations.

More recently, the Court relied on this analysis from *Boyle* to hold that state tort law could not be used to monitor, regulate and penalize the communications between an applicant for FDA approval and the FDA itself. See *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). The state law claim there was that the communications during the FDA approval process contained fraudulent misrepresentations. The Court found such state-law claims preempted, explaining that "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' * * * ." 531 U.S. at 347 (citing *Boyle*). The Chief Justice's opinion for a unanimous Court recognized that federal policy reflected a "balance" in the nature of the required communications between applicants and the FDA. Since this balance "can be skewed by allowing fraud-on-the-FDA claims under state tort law," such theories "conflict with, and are therefore impliedly preempted by, federal law." 531 U.S. at 348.

The same reasoning preempts state tort law from being used to "police" the communications between federal contractors and the military by imposing a higher standard of disclosure about warnings the contractor "should have" given. In *Boyle*, the Court agreed with the Solicitor General that the

government's apparent interest in obtaining the maximum warnings about potential hazards must be balanced against the government's competing interest in securing the involvement of contractors willing to participate in the procurement process and ensuring a constructive working relationship between contractor and government. The balance the Court accepted as federal policy is reflected in the third prong of *Boyle*, which requires contractors to warn only of hazards actually *known*, but not those they merely should have perceived.

Just as in *Buckman*, it would frustrate federal policy to allow state tort law to demand more extensive disclosures to the federal government than federal law requires. Complying with a contractor's federal disclosure obligations "in the shadow of 50 States' tort regimes will dramatically increase the potential burdens facing" companies that would otherwise participate in the military procurement process. 531 U.S. at 350. In terms that equally apply to the impact on that process that would flow from allowing state law to superimpose a "should have known" disclosure standard, the Court reasoned (*id.* at 351):

> [F]raud-on-the-FDA claims would also cause applicants to fear that their disclosures to the FDA, although deemed appropriate by the Administration, will later be judged insufficient in state court. Applicants would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the FDA's evaluation of an application.

As explained in our petition (at 26, 28-30), the same disruptive consequences would flow if contractors such as Sikorsky are left exposed to massive state-law liabilities for failing to warn the military of potential hazards they "should have" identified and then "should have" brought to the government's attention.

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